Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

GREGORY WADE HEMBREE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When this Court issues an opinion establishing a new rule for the conduct of criminal prosecutions to be applied retroactively to all cases pending on direct appeal, as it did in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), may a court of appeals nonetheless refuse to apply the rule to a defendant who had already filed his or her initial brief before the rule was announced and, therefore, did not raise the issue in the initial brief.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Gregory Wade Hembree, Petitioner.

2. United States, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-31a) nor the decision of the United States District Court for the Northern District of Florida (App., *infra*, 32a-43a) are reported. The Eleventh Circuit's non-final order prohibiting the Petitioner from supplementing or amending his initial brief to include a Sixth Amendment challenge to his sentence pursuant to *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004) (App., *infra*, 45a-46a), is reported at 381 F.3d 1109.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its judgment on February 7, 2005 (App., *infra*, 47a), when it denied the Petitioner's petition for rehearing en banc (App., *infra*, 62a). The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254 (Supp. 2004).

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED

The Question Presented does not require interpretation of any statute or specific constitutional provision, although it does directly implicate constitutional issues involving the separation of powers and the nature of judicial review.

STATEMENT

The Petitioner was convicted in federal district court of conspiring to possess cocaine with intent to distribute, perjury, and failure to appear. (App., *infra*, 1a.) At the sentencing hearing, the district court applied the United States Sentencing Guidelines ("USSG" or the "Guidelines") to determine the Petitioner's sentence. Among other rulings, the district court imposed a two-level enhancement to the Petitioner's base offense level for obstruction of justice pursuant to USSG § 3C1.1 and, over the Petitioner's objection, upwardly departed an additional two levels for additional acts of obstruction of justice pursuant to USSG § 2J1.6. (App., *infra*, 27a-28a.)

As clarified in the Eleventh Circuit's opinion, the § 3C1.1 enhancement for obstruction of justice applied because the Petitioner was convicted of perjury. (App., *infra*, 29a.) The Eleventh Circuit ruled that the additional two-level upward departure under § 2J1.6 was appropriate because the district court found that the Petitioner

committed an additional act of perjury by falsely denying his guilt at trial.[1] (App., *infra*, 29a.)

The district court also denied the Petitioner's request for a two-level reduction for acceptance of responsibility pursuant to USSG § 3E1.1, but stated that it would consider the Petitioner's acceptance in determining the ultimate sentence within the applicable guideline range. (App., *infra*, 10a.) The court's questions of the probation officer indicated that it intended to give the lowest permissible sentence under the guidelines:

> THE COURT: Well, let me ask the question again. Without calling it a departure, can I impose a sentence below 78 months [on the conspiracy/perjury counts]?
>
> MR. CONSTANTAKOS: No, Judge, not without declaring it a departure.
>
> THE COURT: And in [the failure to appear case], can I impose a sentence below 12 months consecutive without calling that a departure?
>
> MR. CONSTANTAKOS: No, Judge. Again, the guidelines for that case, by and in and of itself, is 12 to 18 months.

(App., *infra*, 51a-52a.)

The district court had already determined that there was no ground for departing below the guidelines. (App., *infra*, 49a.) As a result, it sentenced the Petitioner to the bottom of the guideline range, which it determined was a

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[1] The perjury conviction related to false testimony in another proceeding (the prosecution of the Petitioner's alleged co-conspirators). (App., *infra*, 3a.)

total sentence of ninety-months incarceration (seventy-eight months on the conspiracy and perjury charges consecutive to a twelve-month term on the failure to appear count). (App., *infra*, 10a-11a.)

The Petitioner appealed his conviction and sentence. Among the issues raised in his initial brief, the Petitioner argued that the district court erred in determining the guideline range.[2] (App., *infra*, 25a.)

Less than three months after the Petitioner filed his initial brief, this Court decided *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). Before filing his reply brief, the Petitioner moved for leave to file a supplemental brief to address whether he was entitled to relief under *Blakely*. (App., *infra*, 53a-58a.) The Petitioner relied on this Court's opinion in *Griffith v. Kentucky*, 479 U.S. 314 (1987), for the proposition that *Blakely* should apply to all cases pending on direct review. (App., *infra*, 54a, 57a.) Conceding that this issue had not been raised in the district court, the Petitioner sought leave to argue that the district court's imposition of a guideline sentence constituted "plain error." (App., *infra*, 54a-55a.)

The circuit court denied this motion citing its earlier opinions that hold that an appellant may not raise additional grounds for reversal after filing the initial brief. (App., *infra*, 44a.)

The Petitioner then filed a motion for leave to file a substitute initial brief or, in the alternative, for the court

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[2] Binding Eleventh Circuit precedent at that time foreclosed any argument that the Sentencing Guidelines violated the Sixth Amendment. *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001), *cert. denied*, 535 U.S. 942 (2002).

to reconsider its denial of his previous motion. (App., *infra*, 59a-61a.) The Petitioner noted that the other circuits to address this issue all allowed supplemental briefing. (App., *infra*, 60a.)

In an order reported at 381 F.3d 1109, the court denied this motion as well and held that an appellant is barred from raising a *Blakely* argument on appeal unless it was included in the initial brief. (App., *infra*, 45a-46a.) The court made clear that this is an absolute bar by noting that an appellant may not circumvent the rule by seeking leave to file an amended initial brief and that the court would not *sua sponte* order substituted or amended principal briefs. (App., *infra*, 46a.)

In its subsequent opinion on the merits, filed on December 8, 2004, the panel affirmed the Petitioner's conviction and sentence in all respects. (App., *infra*, 31a.) The court found that the district court had erred in its guideline calculations and that the applicable total guideline range for all counts was 78 to 97 months, but because the 90-month total sentence fell within this range, the circuit court held that the error was harmless. (App., *infra*, 30a.)

The Petitioner filed a timely petition for rehearing en banc, in which he renewed his arguments that he should be entitled to plain error review based on *Blakely*. (App., *infra*, 72a-75a.) He also argued that the guideline application error was not harmless because the district court had made clear that it intended to give the Petitioner the lowest possible sentence under the guidelines. (App., *infra*, 69a-71a.)

While the petition for rehearing en banc was pending, the Petitioner filed a notice of supplemental authority

citing *Booker* and noting that this Court had explicitly held that *Booker* applies to all cases still pending on appeal. (App., *infra*, 76a-77a.) The Petitioner subsequently filed a notice of supplemental authority citing to *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005) (holding that an appellant may raise, through supplemental filings, a Sixth Amendment challenge to his sentence even though it was not raised in pre-*Blakely* initial brief). (App., *infra*, 78a-79a.)

On February 7, 2005, the Eleventh Circuit denied the petition for rehearing en banc. (App., *infra*, 47a.)

REASONS FOR GRANTING THE WRIT

This Court recently decided that the mandatory application of the Guidelines in determining a defendant's sentence violates the Sixth Amendment, that 18 U.S.C. § 3553(b)(1) (Supp. 2004), the statutory provision making them mandatory, must be excised, and that the Guidelines are therefore only advisory. *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). That decision has created a whole host of issues that the lower courts are beginning to work through. This petition addresses the first basic issue to be ruled upon by all of the courts of appeals, and it demonstrates that the circuits are split and immediate resolution by this Court is urgently needed.

Part I details an 11-1 circuit split on whether an issue created by an intervening Supreme Court decision, such as *Booker*, may be raised for the first time after the initial brief on direct appeal is filed. Perhaps more importantly, Part II demonstrates that this is the case that the Court should take to resolve this critically important conflict.

I. THE CIRCUITS ARE SPLIT ON WHETHER A DEFENDANT MAY EVER RAISE ON DIRECT APPEAL AN ARGUMENT BASED ON AN INTERVENING SUPREME COURT DECISION WHERE HE OR SHE DID NOT RAISE THE ISSUE IN THE INITIAL BRIEF.

The question presented in this petition involves the meaning of this Court's holdings that a new rule for conducting criminal prosecutions applies retroactively to all cases "on direct review." The Court established this general rule of retroactivity in *Kentucky v. Griffith*, 479 U.S. 314 (1987), which represented the culmination of a fundamental change in the Court's retroactivity jurisprudence.

Nearly a century ago, Justice Oliver Wendell Holmes noted that "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). The Court's modern views regarding the "retroactivity of new constitutional rules of criminal procedure" started with the adoption of a three-prong test in *Linkletter v. Walker*, 381 U.S. 618 (1965). *Griffith*, 479 U.S. at 320. This test required consideration of (1) the purpose of the new rule, (2) the extent to which law enforcement officials relied on the prior rule, and (3) the effect that making the rule retroactive would have on the administration of justice. *Id.* at 320-21. *Linkletter* involved determining whether a new rule would be applied retroactively to a

case that had become final[3] by the time the new rule was announced. *Id.* at 320.

In *Johnson v. New Jersey*, 384 U.S. 719 (1966), and *Stovall v. Denno*, 388 U.S. 293 (1967), the Court extended this test to govern the determination of whether a new rule would be retroactively applied to cases that were pending on direct review. *Griffith*, 479 U.S. at 321. The Court determined that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." *Id.* (alterations in original) (quoting *Stovall*, 388 U.S. at 300).

The Court re-examined this conclusion in *United States v. Johnson*, 457 U.S. 537 (1982), however, and concluded it should draw a distinction between final and non-final cases. *Griffith*, 479 U.S. at 321-22. Adopting opinions first argued in dissenting and concurring opinions by Justice Harlan and later by other justices, the Court concluded that "basic norms of constitutional adjudication" required that new rules should generally be applied retroactively to cases pending on appeal at the time the new rule is issued. *Id.* at 322-23. The Court focused on two concerns.

First, it determined that to apply a new rule only to the case under consideration and future cases, while refraining from applying it to other cases pending on appeal, violated the constitutional principle of separation of powers because it would "quite simply [be] an assertion

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[3] The concept of "finality" in this context means that a judgment of conviction has been rendered, all appellate remedies have been exhausted, and the time for filing a petition for a writ of certiorari has expired or a petition has been denied. *Griffith*, 479 U.S. at 321 n.6.

that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in judgment)). The Court concluded that

> it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

Id. (quoting *Mackey*, 401 U.S. at 679).

Second, the Court determined that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith*, 479 U.S. at 323. Thus, the Court held that a new rule should generally be retroactive to cases on direct appeal to avoid "'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." *Id.* (quoting *Johnson*, 457 U.S. at 556 n.16 (emphasis in *Johnson*)).

Despite these concerns, the Court in *Johnson* carved out an exception to this general rule of retroactivity and held that a new rule should not be applied to cases on direct appeal if it "is a 'clear break' with past precedent." *Griffith*, 479 U.S. at 324 (quoting *Johnson*, 457 U.S. at 549-50). This exception barred retroactive application of new rules that "explicitly overruled a past precedent of this Court, or disapproved a practice this Court had arguably sanctioned in prior cases, or overturned a long-standing practice that lower courts had uniformly approved." *Griffith*, 479 U.S. at 325. The Court found that concerns for the reliance of law enforcement officers on the

old rule and the effect the new rule would have on the administration of justice "virtually compelled a finding of nonretroactivity." *Id.* at 324-25 (quoting *Johnson*, 457 U.S. at 549-50).

The Court re-examined and ultimately rejected this exception five years later in *Griffith*. The Court found that its rationale in *Johnson* applied with equal force regardless of whether the new rule constituted a "clear break." *Griffith*, 479 U.S. at 326. The Court initially noted that "the principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific circumstances of the particular new rule announced." *Id.* While the Court did not dispute that the factors of law-enforcement reliance and the administration of justice "may be useful" in determining retroactivity with regard to final cases, "the 'clear break' exception . . . reintroduces precisely the type of case-specific analysis that Justice Harlan rejected as inappropriate for cases pending on direct review." *Id.* at 327.

Additionally, the Court concluded that "the 'clear break' exception creates the same problem of not treating similarly situated defendants the same." *Id.* That a particular new rule may be a clear break from prior precedent "has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." *Id.* at 327-28 (quoting *Johnson*, 457 U.S. at 556 n.16).

As a result, since *Griffith*, all new rules of criminal procedure announced by the Court should apply to all cases pending on direct appeal at the time the new rule is announced. Accordingly, citing *Griffith*, the Court expressly

noted that its holdings in *Booker* "apply . . . to all cases on direct review." *Booker*, 543 U.S. at ___, 125 S. Ct. at 769. In none of this Court's retroactivity jurisprudence has the Court examined the issue of whether a defendant must have predicted the new rule in his or her initial brief for that rule to apply. The Eleventh Circuit's decision in the case below demonstrates that the circuits are split on this issue.

A. The Eleventh Circuit bars a defendant from raising an argument on direct appeal if he or she failed to include it in the initial brief, even if the argument did not become viable until an intervening Supreme Court opinion was decided after the initial brief was filed.

The Eleventh Circuit first confronted this issue in *United States v. Neal*, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001), when it declined to consider an argument based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Both at trial and in his initial brief on appeal, the defendant had argued that the district court erred in not submitting to the jury the issue of the quantity of cocaine he was charged with possessing. *Neal*, 232 F.3d at 829. The Eleventh Circuit allowed the parties to file supplemental briefs after this Court decided *Apprendi*. *Id.* at 830. In his supplemental brief, the defendant not only argued that *Apprendi* required reversal on the issue he had already briefed, but he also argued for the first time that the indictment was defective because it did not plead drug quantity. *Id.*

After finding that the district court's refusal to submit drug quantity to the jury was harmless error, the Eleventh

Circuit refused to consider the second *Apprendi* argument because the defendant did not raise it in his initial brief. 232 F.3d at 830-31. Relying on Rule 28(a)(5), Federal Rules of Appellate Procedure,[4] and Eleventh Circuit Rule 28-1(h),[5] the court held that an appellant is limited to the issues raised in the initial brief and "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority." *Id.* at 830.

In *United States v. Ardley*, 242 F.3d 989 (11th Cir.), *cert. denied*, 533 U.S. 962, *rehearing en banc denied*, 373 F.3d 991 (11th Cir.), *cert. denied*, 535 U.S. 979 (2001), the Eleventh Circuit revisited this issue after this Court granted a petition for writ of certiorari to review the Eleventh Circuit's judgment affirming the defendant's sentence, vacated the judgment, and remanded the case for further consideration in light of *Apprendi*. *Ardley v. United States*, 531 U.S. 1063 (2001). The defendant had not raised "the *Apprendi* issue" in his original briefs to the Eleventh Circuit. *Id.* at 990. Relying on *Neal*, the Eleventh Circuit reinstated its earlier judgment because it held, "In the absence of any requirement to the contrary in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned." *Id.*

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[4] The federal rule requires an appellant to include in the initial brief "a statement of the issues presented for review." Fed. R. App. P. 28(a)(5).

[5] The local rule merely repeats the requirement that the initial brief include a "Statement of the Issues." 11th Cir. R. 28-1(h).

The defendant's petition for rehearing en banc was denied, but Judge Gerald B. Tjoflat wrote a detailed dissenting opinion, joined by Judge Rosemary Barkett. *United States v. Ardley*, 373 F.3d 991 (11th Cir.), *cert. denied*, 535 U.S. 979 (2001). Judge Tjoflat believed that the decision in *Ardley* improperly limited this Court's retroactivity jurisprudence, and he dissented "[b]ecause I do not subscribe to such a limitation on retroactivity, which will have sweeping effects far beyond *Apprendi* cases, and because the panel's opinion has created a circuit split on retroactive application of intervening Supreme Court decisions (with the Eleventh Circuit standing alone)." *Id.* at 996 (Tjoflat, J., dissenting). In a footnote, Judge Tjoflat suggested that the procedural bar announced in *Ardley* might "somehow be limited to *Apprendi* cases, since this circuit has only applied this variation on retroactivity in the *Apprendi* context." *Id.* at 1002 n.15.

After this Court decided *Blakely*, however, the Eleventh Circuit made it clear that *Neal* and *Ardley* were not so limited. In *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004), the defendant petitioned the Eleventh Circuit for rehearing in light of *Blakely*. The Eleventh Circuit's initial opinion had been decided prior to *Blakely*, and the defendant had not argued in his initial brief that the district court violated his Sixth Amendment rights by applying an enhancement under the Guidelines based on facts not found by a jury. *Id.* at 1242. The Eleventh Circuit declined to address this new argument post-*Blakely* "because Levy did not timely raise it in his initial brief on appeal." *Id.* Citing *Ardley*, the court held that the requirement in Rule 28(a)(5), Federal Rules of Appellate Procedure, that an appellant include a statement of the issues presented for review in the initial brief mandates

this result. *Id.* at 1244. The court distinguished prior Eleventh Circuit precedent allowing new issues to be raised either in a supplemental brief or in a petition for rehearing on the ground that these opinions did "not mention, much less discuss" Rule 28. *Id.* at 1244-45.

As in *Ardley*, the Eleventh Circuit denied a petition for rehearing en banc, and Judge Tjoflat again dissented (this time joined by Judge Charles Wilson and, by separate dissenting opinion, Judge Barkett). *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004). In a lengthy opinion, Judge Tjoflat provided four reasons why the defendant should have been allowed to raise the *Blakely* issue. First, he believed that the Eleventh Circuit's rule violated this Court's holding in *Griffith*, which "necessarily trumps the strictly prudential rule that issues not briefed are deemed waived." *Id.* at 1337-41, 1350. Second, he felt that a defendant cannot be deemed to have waived an issue where, as in the context of *Blakely*, binding circuit precedent foreclosed arguing it[6] and the Supreme Court had not yet even granted certiorari on that issue. *Id.* at 1341-43, 1350. Third, he noted that the "panel's opinion continues a circuit split that finds this court standing alone." *Id.* at 1343-48, 1350. Finally, Judge Tjoflat warned that the result of the Eleventh Circuit's rule was to encourage appellants to raise "'a long and virtually useless laundry list' of appellate arguments that are plainly unsupported, or even foreclosed, by precedent," which would cause a "needless waste of legal resources"

[6] At the time that the initial briefs were filed in *Levy* and the case at bar, binding precedent in the Eleventh Circuit provided that the Sentencing Guidelines did not violate the Sixth Amendment. *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001).

and lead to "kitchen-sink" briefs. *Id.* at 1348-51 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

In the case at bar, the Eleventh Circuit made clear in its published order that its rule against raising a new issue pursuant to an intervening Supreme Court decision after the initial brief was absolute and could not be circumvented by seeking leave to amend the initial brief or by the court *sua sponte* considering the issue. (App., *infra*, 46a.) Finally, by denying rehearing en banc after *Booker* was decided and brought to the court's attention, the Eleventh Circuit made clear that this rule applies to *Booker* challenges.

Thus, the Eleventh Circuit has, in effect, grafted the phrase "in which a Sixth Amendment challenge to the Guidelines was raised in the initial brief" to the end of this Court's decision that *Booker* applies to "all cases on direct review." *Booker*, 543 U.S. at ___, 125 S. Ct. at 769; *cf. Ardley*, 273 F.3d at 999 (Tjoflat, J., dissenting) (noting that the Eleventh Circuit's rule "has essentially superimposed an additional requirement onto retroactivity determinations").

B. Every other circuit holds that a defendant may raise a new argument on direct appeal based on an intervening Supreme Court opinion, even if he or she did not raise it in the initial brief.

Every other circuit has declined to engraft this additional requirement onto the retroactivity analysis. Thus, in every other court of appeals, a defendant may raise a new issue based on an intervening Supreme Court decision, even if the issue was not raised in the initial brief.

The First, Sixth, Seventh, and Ninth Circuits have devoted the most explicit analysis to the issue, but each of the circuit courts (other than the Eleventh Circuit) have clearly considered new arguments as demonstrated in the following circuit-by-circuit analysis.

The First Circuit has held that it is "perfectly appropriate" for an appellant to raise a new issue on appeal based on an intervening Supreme Court decision where binding precedent in the circuit formerly foreclosed the argument. *United States v. Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004). Thus, that circuit has not hesitated to review, for example, a *Blakely* argument raised for the first time after the initial brief was filed. *E.g.*, *United States v. Glenn*, 389 F.3d 283, 287-88 (1st Cir. 2004); *United States v. Fraser*, 388 F.3d 371, 373 (1st Cir. 2004); *United States v. Stearns*, 387 F.3d 104, 106-07 (1st Cir. 2004). Most recently, the First Circuit went further and *sua sponte* offered an appellant the opportunity to argue for the first time that a "*Booker* remand" is appropriate because the district court imposed a sentence on the belief that the guidelines were mandatory. *See United States v. Antonakopoulos*, ___ F.3d ___, ___, 2005 WL 407365, *12 (1st Cir. Feb. 22, 2005).

The Second Circuit's opinions allowing defendants to raise *Blakely* issues for the first time in supplemental briefing include: *United States v. Gayle*, 389 F.3d 406, 411 (2d Cir. 2004), *United States v. Granik*, 386 F.3d 404, 410 n.4 (2d Cir. 2004) (same), and *United States v. Peterson*, 385 F.3d 127, 143 (2d Cir. 2004) (same).

The Third Circuit's opinions allowing defendants to raise *Blakely* issues for the first time in supplemental briefing include: *United States v. Mortimer*, Case No.

03-4174, 2005 WL 318650, *4 (3d Cir. Feb. 10, 2005) (remanding for resentencing under *Booker*), and *United States v. Trala*, 386 F.3d 536, 547 n.15 (3d Cir. 2004).

The Fourth Circuit has specifically held that it must consider a *Booker* argument, even where it was not raised in the initial brief. *See United States v. Washington*, ___ F.3d ___, 2005 WL 326986 (4th Cir. Feb. 11, 2005) (noting that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we "must apply [*Booker*] . . . to all cases on direct review"); *see also United States v. Lowry*, 116 Fed. Appx. 446, 448 (4th Cir. 2004) (allowing defendant to raise *Blakely* for first time in supplemental briefing); *United States v. Pendergraph*, 388 F.3d 109, 114 (4th Cir. 2004) (same); *United States v. White*, 238 F.3d 537, 541 (4th Cir.) (considering *Apprendi* argument raised for first time in supplemental brief), *cert. denied*, 532 U.S. 1074 (2001).

The Fifth Circuit's opinions allowing defendants to raise *Blakely* issues for the first time in supplemental briefing include: *United States v. Jones*, 120 Fed. Appx. 524, 524 (5th Cir. 2004), *United States v. Williams*, 114 Fed. Appx. 146, 147 (5th Cir. 2004), and *United States v. Cruz*, 388 F.3d 150, 158 (5th Cir. 2004). *See also United States v. Clinton*, 256 F.3d 311, 313 (5th Cir.) (considering *Apprendi* errors raised for the first time after the initial brief), *cert. denied*, 534 U.S. 980 (2001); *United States v. Delgado*, 256 F.3d 264, 280 (5th Cir. 2001) (same); *United States v. Miranda*, 248 F.3d 434, 443-44 (5th Cir.) (same), *cert. denied*, 534 U.S. 980 (2001).

The Sixth Circuit analyzed the issue specifically in light of *Booker* in *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005). The defendant had filed his initial brief before *Blakely* and first raised his Sixth Amendment challenge by filing a letter of supplemental authority referencing *Blakely* pursuant to Rule 28(j), Federal Rules of Appellate Procedure,[7] before oral argument. *Id.* at n.1. The court accepted this as the proper means of raising the issue:

> We conclude that the steps taken by Oliver both before and after oral argument were sufficient to raise on appeal the issue of the constitutionality of Oliver's sentence. Both letters submitted by Oliver complied with requirements of Rule 28(j) and, along with counsel's statement at oral arguments, provided us with notice of the challenged issue.

Id.; *see also United States v. Hines*, ___ F.3d ___, 2005 WL 280503 (6th Cir. Feb. 7, 2005) (finding that defendant sufficiently raised *Blakely* issue in court of appeals by filing supplemental briefing after *Blakely*).

The Seventh Circuit has also expressly approved of a defendant raising a *Booker* argument for the first time after filing the initial brief.

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[7] This rule provides:

> If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Fed. R. App. P. 28(j).

> Although Henningsen did not raise the issue of constitutionality in his brief, he made notice of the *Blakely* and *Booker* decisions in a subsequent filing and raised the issue during argument. In light of the uncertainty surrounding this issue and the questionable constitutionality of Henningsen's sentencing enhancement, we do not find that Henningsen has waived his right to challenge the validity of the district court's sentencing enhancement.

United States v. Henningsen, 387 F.3d 585, 591 (7th Cir. 2004).

The Eighth Circuit, pursuant to an Administrative Order dated September 27, 2004, adopted the policy of denying motions for leave to raise a Sixth Amendment challenge under *Blakely*, until after this Court decided *Booker*. *See United States v. Walker*, 393 F.3d 842, 849 n.4 (8th Cir. 2005) (reserving ruling on *Blakely* challenge pending decision in *Booker*, even though issue was not raised until motion to file supplemental brief); *United States v. Borer*, 394 F.3d 569. (8th Cir. 2005) (denying motion to raise *Blakely* after briefs were filed, but noting that court would consider issue on petition for rehearing once *Booker* was decided). That court also considered *Apprendi* issues raised after the initial brief was filed. *United States v. Maynie*, 257 F.3d 908, 918 (8th Cir. 2001), *cert. denied*, 534 U.S. 1151 (2002); *United States v. Scott*, 243 F.3d 1103, 1107-08 (8th Cir. 2001); *United States v. Poulack*, 236 F.3d 932, 935 (8th Cir.), *cert. denied*, 534 U.S. 864 (2001).

The Ninth Circuit has held that not only may a defendant raise a *Blakely* claim for the first time after filing a pre-*Blakely* brief, but the court has the authority to consider such an issue *sua sponte*. *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004), *rehearing*

granted to grant different remedy, ___ F.3d ___, 2005 WL 350811 (9th Cir. Feb. 10, 2005). That court noted that the non-*Blakely* sentencing challenges in the initial brief were "beside the point," if (as this Court ultimately held in *Booker*) the Guidelines violated the Sixth Amendment because they assume the Guidelines apply. *Id.* It went on to reason, "Assuming *Blakely* does implicate sentences imposed under the Guidelines, as Ameline has argued in his post-submission briefing, to simply address Ameline's initial arguments would be to answer questions that may no longer be relevant to federal criminal sentencing." *Id.*

The Tenth Circuit appears to have followed suit. *See United States v. Badilla*, 383 F.3d 1137, 1142 n.2 (10th Cir. 2004) (reviewing and rejecting plain-error claim under *Blakely* that was first raised in a "motion for post-submission consideration"); *United States v. Westover*, 107 Fed. Appx. 840, 847 (10th Cir. 2004) (affirming all claims raised in the defendant's brief but granting leave to file supplemental brief "to raise additional issues in light of *Blakely*," which was "decided after initial briefing and argument"). *But see United States v. Rosales*, 112 Fed. Appx. 685, 692 (10th Cir. 2004) (refusing to consider *Blakely* issue raised in Rule 28(j) letter of supplemental authority and citing *Ardley*); *United States v. Maldonado-Ramires*, 384 F.3d 1228, 1230 n.1 (10th Cir. 2004) (refusing to consider *Blakely* argument raised in letter of supplemental authority "because [the defendant] did not ask to file a brief raising a proper *Blakely* challenge").[8]

[8] Judge Tjoflat has attempted to reconcile the seemingly conflicting positions of the Tenth Circuit as holding that an issue created by an intervening Supreme Court decision may be raised for the first time in

(Continued on following page)

Finally, the District of Columbia Circuit has also considered a *Blakely* argument that was not raised in the initial brief. *United States v. West*, 392 F.3d 450, 460 (D.C. Cir. 2004).

Thus, all of the circuits have ruled on the question presented, and they are split 11-1 in favor of the Petitioner.

II. OF THE MANY CASES LIKELY TO GENERATE CERTIORARI PETITIONS, THIS CASE IS PARTICULARLY WORTHY OF REVIEW.

The Court appears well aware that the issue raised in this petition impacts a significant number of United States citizens – most particularly the thousands of defendants who filed their initial briefs on appeal before *Blakely* was decided, but whose direct appeals were still pending at the time *Booker* was decided, as well as the families of those defendants. *See, e.g., Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue.") For example, on January 24, 2005, this Court issued over 400 orders granting certiorari, vacating, and remanding for reconsideration under *Booker*. Only resolution of this conflict will preserve the Guidelines' goal of uniformity in sentences. *Booker*, 543 U.S. at ___, 125 S. Ct. at 761 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity") (citing 28 U.S.C. § 991(b)(1)(B)). Thus, the question of whether certiorari review of these issues is appropriate

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a supplemental brief, but not in a simple Rule 28(j) letter of supplemental authority. *Levy*, 391 F.3d at 1346 n.16 (Tjoflat, J., dissenting).

appears more a question of "when" than "if." For at least four reasons, the time is now.

First, the question presented has implications reaching far beyond the context of *Booker*. It arises any time this Court creates a new rule of law applicable to cases on direct appeal. Particularly because one of the underlying principles behind this Court's retroactivity jurisprudence is the need to treat similarly situated defendants in a similar fashion, *Griffith*, 479 U.S. at 323, 327-28, a uniform rule of law for all of the circuits should be established as soon as possible. Until then, a defendant convicted in Savannah, Georgia, for example, will be deprived of the right to relief from an unconstitutional sentence while a defendant convicted across the river in South Carolina who is otherwise identically situated will have that right.

Second, the federal courts have already gone through a distressing period of flux between this Court's decisions in *Blakely* and *Booker*. Prior to *Blakely*, the federal sentencing process had become well settled, generally only requiring legal analysis with regard to interpreting new guidelines or commentary. *Blakely* forced each court to reconsider its base principles such as whether the mandatory Guideline system violated the Sixth Amendment in light of *Blakely* and, if so, how to remedy the violation. The courts entered a third phase upon the release of this Court's decision in *Booker*. The courts of appeals are now processing the hundreds of appeals potentially affected. If and when this Court resolves the retroactivity issue, however, at least one of those courts (the Eleventh Circuit)

will have to enter into a fourth phase.[9] The stability of the sentencing duties of the federal courts requires a prompt resolution of this issue. Moreover, the circuit split is as developed as it is likely to get. Unless a circuit reviews this issue en banc, the circuits' positions on the question presented are all set in stone.

Third, although the Eleventh Circuit stands alone in the circuit split, it is clear that the court is not going to change its position en banc. Not only did that Court issue a published order denying leave to raise *Blakely* and deny the Petitioner's request for rehearing en banc after *Booker*, but it also denied rehearing en banc on this issue in two cases pursuant to orders accompanied by concurring and dissenting opinions thoroughly outlining the positions of the members of that court. *Levy*, 391 F.3d at 1328-1335 (Hull, J., concurring); *id.* at 1135-51 (Tjoflat, J., dissenting); *id.* at 1351-56 (Barkett, J., dissenting); *Ardley*, 273 F.3d at 991-95 (Carnes, J., concurring); *id.* at 995-1007 (Tjoflat, J., dissenting). In short, the circuit split will not resolve itself over time. Resolution by this Court is urgently needed.

Fourth and finally, this case squarely frames the question presented because the answer to the question will directly impact the Petitioner's sentence. Although he did not raise the issue in the district court, the Eleventh Circuit has concluded that a defendant satisfies the plain-error test if he or she can demonstrate a sufficient likelihood that the district court would have imposed a lower sentence if it

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[9] Of course, if this Court adopts the position of the Eleventh Circuit, then the impact will be more than tenfold, as the eleven other circuits will have to enter this fourth phase.

had known that the Guidelines were not mandatory. *United States v. Rodriguez*, ___ F.3d ___, ___, 2005 WL 272952, *6-10 (11th Cir. Feb. 4, 2005).[10] The Petitioner's case should satisfy even the most stringent definition of prejudice because not only did the district court give the Petitioner the lowest possible guideline sentence, it also questioned the probation officer to make sure it could not go lower. It is therefore clear that the Petitioner's fate rests on whether this Court grants review.

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[10] Although the other circuits to have addressed the plain-error argument after *Booker* have reached differing conclusions regarding the showing of prejudice needed, they all agree that a *Booker* error satisfies the other prongs of the test for plain error. *See Antonakopoulos*, ___ F.3d at ___, 2005 WL 407365 (1st Cir.); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); *United States v. Crosby*, 347 F.3d 103 (2d Cir. 2005); *United States v. Hughes*, 396 F.3d 374, 379-81 (4th Cir. 2005); *see also Ameline*, 376 F.3d 967 (9th Cir. 2004) (finding plain error under *Blakely*), *rehearing granted to grant different remedy*, ___ F.3d ___, 2005 WL 350811 (9th Cir. Feb. 10, 2005).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted so the Court can resolve this important issue on which the circuits are split.

Respectfully Submitted,

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APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16001
Non-Argument Calendar

D.C. Docket No. 02-00070-CR-3-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY WADE HEMBREE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(DECEMBER 8, 2004)

Before CARNES, PRYOR and FAY, Circuit Judges.

PER CURIAM:

A jury convicted appellant Gregory Wade Hembree of one count of conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii). The same jury also convicted Hembree of one count of perjury, and Hembree later pled guilty to a charge of failing to appear. The district court then consolidated

Hembree's cases for sentencing. The Defendant challenges his conviction on several grounds. First, as to the conspiracy count, the Defendant asserts that the district court committed plain error when it: (a) allowed the government to amend the indictment to charge a conspiracy for simple possession in addition to conspiracy with intent to distribute; (b) failed to instruct the jury on the statute of limitations in relation to the conspiracy; (c) allowed the Defendant's former wife to testify as to confidential communications; (d) permitted the government to introduce evidence of the Defendant's prior drug use; (e) failed to enforce its order that the government provide a bill of particulars; and (f) neglected to give a cautionary jury instruction regarding accomplice testimony. Second, the Defendant argues that the district court plainly erred in relation to the perjury count by: (a) failing to sever the perjury count from the conspiracy count; and (b) allowing defense counsel to stipulate to the element of materiality and not instructing the jury that it must unanimously find the statement to be material. Finally, the Defendant challenges his sentence, and maintains that the district court erred in: (a) refusing to credit him for acceptance of responsibility in his failing to appear case; and (b) refusing to group the failure to appear conviction with the conspiracy and perjury convictions. We disagree, finding no reversible error in the proceedings below and affirm the district court.

I. Facts

On July 17, 2002, an indictment charged Gregory Wade Hembree with conspiracy and perjury in the Northern District of Florida. Specifically, Count I charged that from roughly January 1, 1997, through approximately

December 1998, Hembree knowingly and willfully conspired with other persons to possess with intent to distribute five hundred grams or more of cocaine. Count II charged that on or about December 8, 1999, while under oath as a witness in the trial of Gregory and Nodie Lake, Hembree knowingly made a false material declaration, in violation of 18 U.S.C. § 1623. The indictment alleged that at the Lakes' trial for conspiracy to possess with intent to distribute cocaine and marijuana, Hembree denied any knowledge of the Lakes' drug activities or his involvement with them, when Hembree in fact did know about the Lakes' involvement with the distribution of cocaine and had received and used cocaine at their home.

After the indictment, Hembree filed a motion for a bill of particulars, claiming that the allegations were too generalized from which to prepare his ease, a statute of limitations defense, or an alibi defense. Furthermore, the Defendant alleged that his participation in the criminal conspiracy terminated prior to January 1, 1997 and that any alleged activity prior to July 16, 1997, was outside the five-year statute of limitations.

In response to the district court's order directing the government to produce a bill of particulars, the government explained that it could not provide specific dates regarding Hembree's participation, and could only allege, based on interviews with Hembree's coconspirators, that the conspiracy continued through the 1997 and 1998 calendar years. The government identified Gregory and Nodie Lake, who were married and Hembree's long-time friends, and Kelli Hembree, his ex-wife, as the coconspirators. All of the co-conspirators told the government that the Defendant was involved in the conspiracy after his

daughter's birth in July 1997, in contrast to Hembree's insistence that he did not participate after that time.

The testimony at Hembree's trial revealed that Hembree and Nodie Lake knew each other from the age of fourteen, when they attended school in Gainesville, Florida. Nodie and Greg Lake were dating at the time she introduced Hembree to Greg in 1982 or 1983. Greg Lake and Hembree then established a relationship and worked together in the drug business.

Nodie and Greg Lake married just prior to Greg's sentencing on federal drug charges in 1986, and Nodie eventually moved to Walton County, Florida while Greg was in federal prison there. In 1991, Greg Lake was released, and the Lakes continued to live in Walton County. Hembree also moved to the area, working construction jobs and helping Greg with a sun care products business.

At the completion of his parole, Greg Lake re-established his drug business and began getting cocaine from a source in South Florida. Greg re-entered the cocaine business in order to support his and Nodie's expensive addiction to painkillers. Hembree also used pills and cocaine, although he lacked the funds to use the drugs at the Lakes' level.

Greg Lake introduced Hembree to his future wife, Kelli, in 1996, while Hembree was involved with Greg's cocaine distribution business. Kelli also began abusing pills and cocaine with the Defendant and the Lakes. Hembree worked as Greg Lake's courier, driving to South Florida to pick up cocaine. Hembree also sold cocaine that Greg Lake would advance to him on credit, and Hembree

would reimburse Lake after he sold the cocaine. Greg Lake testified that Hembree sold the majority of Lake's cocaine.

Nodie Lake testified that she made two trips to Miami, flying down to meet Hembree after he drove there to pick up the cocaine. On the first trip, in July 1997, Nodie and Hembree received a half-kilogram of cocaine, and drove home together. When Nodie and Hembree arrived at the Lakes' home, Greg and Hembree spliced the cocaine with cutting agents, and repackaged the cocaine into eight-ounce quantities for sale and distribution.

On the second trip, in August or September of 1997, Nodie again flew to Miami to meet Hembree and buy cocaine. After receiving a half-kilogram, Nodie flew home and Hembree drove the cocaine back to the Lakes'. Greg Lake and Hembree again mixed the cocaine with a cutting agent, and repackaged for distribution to Greg Lake's sellers, including Hembree. Greg Lake testified that Hembree generally received two to four "eight balls" from him at a time, and at most received one-quarter of a kilogram.

Kelli Hembree testified pursuant to a subpoena and a grant of immunity. Kelli stated that she met the Defendant in 1996 through Greg Lake, and that she and the Defendant were married from March 1997 until 2000. Kelli had a child from her first marraige [sic], and a daughter, Jordan, was born to Kelli and the Defendant on July 22, 1997, the time that the Defendant asserted that he ended his participation in the Greg Lake's drug business. Kelli Hembree confirmed that she was present when her then-husband and Greg Lake mixed, weighed, and packaged cocaine for resale. Kelli also confirmed that the Defendant stored the cocaine he sold for Greg Lake at their residence,

and that customers came to the Defendant's home to buy cocaine from both Hembrees.

Kelli also testified that she and the Defendant used cocaine at the same time they used prescription pain killers, which they got from Dr. Nicholas Malamos, a friend of the defendant. Kelli stopped using drugs during her pregnancy, but the Defendant continued to use drugs throughout. After the birth of their daughter, Kelli resumed her cocaine and pill habit. Kelli and the two children made one trip with the Defendant to Miami to retrieve cocaine, and knew of other trips that Hembree made alone.

Dr. Nicholas Malamos practiced internal medicine in Destin and Niceville, Florida, when he met Gregory Hembree in late 1995 or 1996. Malamos testified that the two became friends, and Malamos hired Hembree to build his house in Destin. Hembree and Malamos formed a symbiotic relationship, whereby Hembree provided the cocaine, and Dr. Malamos provided the prescriptions for pain killers. Hembree introduced Dr. Malamos to Greg Lake in early 1997 or 1998. Thereafter, Dr. Malamos purchased cocaine from both Hembree and Greg Lake, and testified that he was sure that he saw cocaine in Hembree's home in late 1997 or early 1998, as it was after Dr. Malamos moved into the house Hembree built for him. Dr. Malamos also verified that he continued to purchase cocaine from Hembree after the birth of his daughter because the Hembrees delivered cocaine to him and brought her along. Moreover, Dr. Malamos testified that

Hembree continued to deliver cocaine after Jordan was old enough to walk.[1]

In August 1999, agents searched Nodie and Greg Lake's home and indicted them on federal drug charges. Greg Lake called Hembree before the December 1999 trial, and asked him to testify for the Lakes. Greg Lake believed that Hembree would testify to Greg's innocence, since it would be in Hembree's best interest not to be implicated in the crime. Hembree visited with Dr. Malamos prior to the Lakes' trial. Malamos told Hembree that his attorney had advised him to "plead the Fifth," and Malamos recommended that Hembree do the same.

Hembree appeared at the Lakes' trial under subpoena from the government. Greg Lake's attorney called Hembree to the stand after the government did not use Hembree as a witness. Hembree testified under oath that he had no knowledge of the Lakes' involvement with marijuana or cocaine, and that he never received cocaine from them. After the trial, Hembree admitted to Dr. Malamos that he lied when he testifed. At his own trial, Hembree also admitted he lied at the Lake's trial, but claimed he did so because Greg Lake threatened Hembree and his family.

At the close of Hembree's trial, the district court read and gave copies of the instructions to the jury. Specifically, the court instructed the jury on Hembree's defense of withdrawal and the statute of limitations. The jury was

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[1] Dr. Malamos later pled guilty to writing prescriptions for controlled substances outside the realm of his normal medical practice. Dr. Malamos was serving his sentence at the time testified in Hembree's trial.

aware from both the instructions and verdict form that the government was required to prove beyond a reasonable doubt that Hembree did not withdraw from the conspiracy prior to July 17, 1997. The verdict form provided a space for the jury's finding on the date of withdrawal, if any.

As to the second count, the court instructed that it was a federal crime for anyone to make a false statement under oath while appearing as a witness. In regard to materiality, the jury was required to find, beyond a reasonable doubt, that Hembree's testimony in the Lake case "was false in one or more of the ways charged concerning some material matter in the proceedings before the court." The court enumerated on this requirement, instructing that:

> The making of false statement is not an offense unless the falsity relates to a material fact. A representation is material if it has a natural tendency to affect or influence or is capable of affecting or influencing the exercise of the judge's or jury's decision making process. The test is whether the false statement had the capacity to impair or pervert the function of the court. In other words, a misrepresentation is material if it is related to an important fact as distinguished from some unimportant or trivial detail. It is not necessary for the government to prove, however, that the court or jury was, in fact, misled or influenced in any way by the false statement.

At his trial, Hembree stipulated to both the indictment from the Lake trial and to a transcript of his own testimony during the Lake trial. Hembree also stipulated that the transcript was accurate, that he made the statements contained in the transcript while under oath, that those statements were material, that he made those

statements knowingly and willfully, and that they were false.

During deliberations, the jury sent a note to the district court judge asking, "If the defendant never withdrew from the conspiracy, does the statute of limitations date apply?" The court pointed the jury to a specific instruction, which read, "Thus, the Government must prove beyond a reasonable doubt both that the conspiracy continued at least until or after July 17, 1997, and that the Defendant did not withdraw from the conspiracy prior to that date." Hembree did not object to that instruction.

The jury returned guilty verdicts on both counts of the indictment on January 8, 2003, after a three-day trial. The jury indicated on the verdict form that it found that Hembree did not withdraw prior to July 17, 1997. The court set sentencing for March 28, 2003, and granted Hembree's motion to substitute counsel. Hembree failed to appear for his sentencing hearing, and the court issued a bench warrant for his arrest. Hembree was arrested on August 8, 2003, as he was entering Texas from Mexico, and charged with knowingly and willfully failing to appear for sentencing, in violation of 18 U.S.C. §§ 3146(a)(1), (b)(1)(A)(i), and (b)(1)(A)(ii). Hembree voluntarily entered a plea of guilty to that charge, and the trial court consolidated his cases for sentencing.

Hembree's presentence report combined the sentencing for the conspiracy and perjury conviction along with the sentencing for the failure to appear conviction under U.S.S.G. § 3D1.2(c) for the purpose of determining the offense level. Because the jury held the Defendant responsible for over 500 grams of cocaine, but less than two kilograms, Hembree's base offense level totaled 26 pursuant to

§ 2D1.1. An additional two points were added to the offense level for obstruction of justice when Hembree testified falsely at his own trial. An offense level of 28 and criminal history category of I scored the Defendant's guideline range between 78 and 97 months. The presentence report also detailed that any sentence for Hembree's failure to appear was to run consecutively pursuant to 18 U.S.C. § 1623.

At Hembree's sentencing hearing, the court sustained the two-point addition for obstruction of justice, but granted a two-level reduction under the safety valve provision, returning the Defendant's offense level to 26. Thereafter, the court departed upward two levels to account for Hembree's additional obstructive actions. This departure resulted in a total offense level of 28. Hembree argued for another two-point reduction for his acceptance of responsibility in his failure to appear case, based upon his voluntary surrender to authorities. The court rejected Hembree's argument, but commented that it would take Hembree's contrition into account in some other fashion when imposing sentencing.

The district court originally sentenced Hembree to 80 months for the drug conspiracy to run concurrently with 60 months for perjury. The court tacked on another 12-month term for the failure to appear charge. The total sentence amounted to 92 months, which the court explained was within the guideline range while simultaneously acknowledging Hembree's acceptance of responsibility with respect to the failure to appear case.

After the court imposed the sentence, the Defendant continued to argue for a further reduction for acceptance of responsibility. The district court responded by reducing

the drug conspiracy sentence to 78 months, as the 12 month sentence was already the minimum in the failure to appear case. Hembree's final sentence was then 90 months; 78 months for the conspiracy and perjury charges and 12 months for failure to appear.

III. Standards of Review

Hembree's trial counsel failed to object to any of the trial errors asserted in this appeal. As a result, this Court reviews those matters for plain error.[2] *United States v. Hall*, 314 F.3d 565, 566 (11th Cir. 2002); *United States v. Gresham*, 325 F.3d 1262, 1265 (11th Cir. 2003). Under this standard, Hembree must establish that: (1) an error occurred; (2) the error was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness of the judicial proceedings. *United States v. Humphrey*, 164 F.3d 585, 588 n.3 (11th Cir. 1999).

This Court reviews a district court's interpretation and application of the sentencing guidelines *de novo See United States v. Njau*, 386 F.3d 1039 (11th Cir. 2004); *United States v. Mesa*, 247 F.3d 1165, 1168 (11th Cir. 2001). We review the "factual findings underlying the

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[2] Many of the issues before us in this appeal are essentially claims of ineffective assistance of counsel. We note that had the Defendant specifically raised his claims of error as such, we could not consider them on direct appeal. *See United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988); *see also United States v. Souder*, 782 F.2d 1534, 1539-40 (11th Cir.1986). The errors complained of here would be better suited for a collateral proceeding in the district court where it would have an opportunity to explore the issue and develop the record. After the issue is raised in the trial court, this Court would be afforded an order and a record to review. *United States v. Griffin*, 699 F.2d 1102, 1109 (11th Cir.1983).

decisions for clear error." *United States v. Miranda*, 348 F.3d 1322, 1333, n.14 (11th Cir. 2003).

IV. The Conspiracy Count

Hembree complains that the district court committed numerous mistakes during trial that amounted to plain error such that he is entitled to a new trial. Hembree argues that the court's failure to "reign in the government" resulted in a fundamentally flawed and unfair trial, and that we, in turn, should reverse his conviction. Nonetheless, Hembree recognizes that because of his counsel's failure to object to any of the alleged errors at trial he has the burden of demonstrating that any error amounted to plain error. *See Gresham*, 325 F.3d at 1265. Under the plain error standard, this Court only cures errors that are "particularly egregious and that seriously affect the fairness, integrity, or public reputation of the judicial proceedings," *United States v. Puche*, 350 F.3d 1137, 1151 (11th Cir. 2003) (citations omitted). Even when such intolerable errors arise, however, we will correct only those that would result in a miscarriage of justice. *Puche*, 350 F.3d at 1151.

A. Constructive Amendment of the Indictment

Hembree charges that the government and the district court essentially amended the indictment to charge a conspiracy for simple possession in addition to conspiracy with intent to distribute. The evidence, however, reveals otherwise. "'Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.'" *United States v. Toler*, 144 F.3d 1423, 1425 (11th Cir. 1998) (quoting *Iannelli v. United States*, 420 U.S. 770, 777, 95

S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975)). "The agreement is the 'essential evil at which the crime of conspiracy is directed,' and 'agreement remains the essential element of the crime.'" *Id.* (quoting *Iannelli*, at 777 n. 10, 95 S.Ct. at 1290 n. 10).

Each government witness demonstrated the existence of a conspiracy between Hembree, the Lakes, and others to possess cocaine with the intent to distribute it. Under 21 U.S.C. § 846, the government must prove: "(1) an agreement existed among two or more persons; (2) ... the defendant knew of the general purpose of the agreement; and (3) ... the defendant knowingly and voluntarily participated in the agreement" *Toler*, 144 F.3d 1423, 1425 (11th Cir. 1998) (quoting *United States v. High*, 117 F.3d 464, 468 (11th Cir. 1997). Among other things, the Government's witnesses testified about Hembree's involvement with the purchase, packaging, and resale of cocaine, in conjunction with rental cars, airplane trips, money transfers, phone calls, and deliveries. Even though testimony indicated that Hembree had more than a limited role in the conspiracy, a defendant can be convicted of conspiracy even if his level of involvement in the plan is "slight" when compared to the actions of his co-conspirators. *Toler*, 144 F.3d at 1428.

The evidence presented does not constitute a constructive amendment to the indictment. Hembree argues that the government's case only established possession, a crime for which he was not charged. On cross-examination, Hembree admitted that he used cocaine with the Lakes and others, and now asserts that his participation consisted of simple possession. He asks that we ignore the testimony of numerous witnesses, and Hembree's own testimony, all of which demonstrate that his activities far

exceeded simple possession. Hembree admitted not only that he used and shared cocaine, which would be grounds for possession, but that he also made trips to Miami to pick up half of a kilogram of cocaine, delivered it to Greg Lake, and then helped Lake mix and repackage the cocaine. Such evidence, which consists of the defendant's own admission, is sufficient to convict Hembree. "The amount of cocaine . . . the [process] used to dilute the purity of the cocaine and to separate large quantities into smaller quantities for retail purposes are sufficient for the jury to have found intent to distribute." *United States v. Poole*, 878 F.2d 1389, 1392 (11th Cir. 1989).

Moreover, the trial judge did not commit error for failing to instruct the jury on the distinction between distribution and transfers for personal use. In fact the court directed that "a person who buys a small quantity of a controlled substance for personal use does not thereby become a conspirator." The district court further elaborated that neither mere presence at the scene, simple association with conspirators, nor conspiratorial behavior without knowledge necessarily qualifies one as a conspirator. This was more than adequate for the jury to discern whether Hembree's participated in the distribution facet of the conspiracy. Consequently, the defendant has failed to demonstrate error as to this issue.

B. Jury Question

Here, Hembree contends that the district court's response to the jury question amounted to plain error requiring reversal. The defendant submits that the trial court should have explained that the statute of limitations defense precluded a conviction based solely on his admitted

conduct in 1996. We disagree. Even if Hembree only made the one cocaine run in 1996, an assertion unsupported in the record, the jury still found that he did not withdraw from the conspiracy prior to July 17, 1997. "The law of this circuit is that 'a conspirator's participation in a conspiracy is presumed to continue until all activity relating to the conspiracy is ceased.'" *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (citing *United States v. LeQuire*, 941 F.2d 1554, 1563-64 (11th Cir. 1991)).

For Hembree to establish his withdrawal from the conspiracy, he had the burden of proving: (1) that he took "affirmative steps, inconsistent with the objectives of the conspiracy, to disavow or to defeat the objectives of the conspiracy;" and (2) that he communicated those acts to his co-conspirators in a reasonable effort or that he informed law enforcement of the scheme. *Startrett* [sic], 55 F.3d at 1550 (citations omitted). "A mere cessation of activity in the conspiracy is not sufficient to establish withdrawal." *Id.* The jury properly found that the conspiracy, and Hembree's involvement in it, continued beyond July 1997 and into 1998. When the jury asked, "If the defendant never withdrew from the conspiracy, does the statute of limitations date apply," the district court properly referred it to the instructions which required "both that the conspiracy continued at least until or after July 17, 1997, and that the Defendant did not withdraw from the conspiracy prior to that date." This did not mislead the jury, and as such, no error was committed.

C. Marital Privilege

Hembree next argues that the district court committed plain error by allowing his ex-wife to testify, in violation of marital privilege. This Court has held that information privately disclosed between a husband and wife in the confidence of the martial relationship is privileged. *United States v. Singleton*, 260 F.3d 1295, 1297-98 (11th Cir. 2001). The purpose of this privilege is to preserve sanctity, trust, and "domestic tranquility" within a marriage. *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).[3] The privilege, however, does not extend to "conversations between husband and wife about crimes in which they are jointly participating when the conversations occur." *Id.* Furthermore, many of the statements consisted of Hembree and his then-wife Kelli making plans to receive, sell, and deliver cocaine. "The marital privilege does not protect those conversations made in furtherance of a conspiracy." *United States v. Malekzadeh,* 855 F.2d 1492, 1496 (11th Cir. 1988) (citing *United States v. Entrekin,* 624 F.2d 597, 598 (5th Cir.1980)). Thus, the testimony of Hembree's former wife falls "squarely within the exception to privileged marital communications" prescribed *Mendoza* and *Malekzadeh* and properly were admitted by the district court. *Entrekin,* 624 F.2d at 598.

D. Evidence of Defendant's Drug Use

Hembree challenges the government's presentation of his drug use during opening statement, trial and closing

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

argument. Hembree argues that its admission amounted to the impermissible employment of bad character evidence. Although Federal Evidence Rule 404(a) precludes the use of evidence solely for the purposes of demonstrating bad character, "evidence that forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted is admissible even if it tends to reflect negatively on the defendant's character." *United States v. Foster,* 889 F.2d 1049, 1053 (11th Cir. 1989) (citation omitted). The testimony regarding Hembree's drug use was relevant to Hembree's "opportunity, intent, preparation, planning, and knowledge of the circumstances" encompassing the conspiracy to possess cocaine with intent to distribute – conventional Rule 404(b) purposes. *Id.*

Even beyond Rule 404(b), Hembree's drug use was directly linked to the conspiracy. Not only did he sell cocaine for his supplier, Greg Lake, he also sold cocaine to Dr. Malamos, who in turn gave Hembree prescriptions for pain medications. Furthermore, Hembree and his coconspirators entered the narcotic business in part to fund their addictions to cocaine and prescription pain medications. Hembree's ongoing drug use and his interaction with his coconspirators while consuming drugs was a vital part of the conspiracy. *See United States v. McLean,* 138 F.3d 1398, 1403 (11th Cir. 1998) ("Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.").

Finally, the evidence of drug use related to the elements of the crimes charged not because it demonstrated Hembree's propensity to distribute cocaine in a manner for which he was charged, "but precisely because the evidence related directly to the crimes charged." *Foster,* 889 F.2d at 1054. When the challenged evidence is "inextricably intertwined with evidence regarding the charged offense" as an indivisible and ordinary part of the case, "the evidence is not extrinsic and therefore Rule 404(b) [does] not come into play." *United States v. Ramsdale,* 61 F.3d 825, 829 (11th Cir. 1995); *Foster,* 889 F.2d at 1054 (citations omitted). Thus, the district court did not commit plain error by allowing the government to present this evidence at certain points during the trial.

E. Bill of Particulars

Hembree claims that the district court failed to enforce its order that the Government provide a bill of particulars. Hembree argues that the Government "sandbagged" critical evidence when it told the court it could not be specific about timeframes, and thereby prejudiced Hembree's alibi defense. This claim of "sandbagging" is unsupported by the record. The Government's response to the court's order reveals that the birth of Hembree's daughter, Jordan, on July 21, 1997, provided the determinative benchmark. Both the witnesses and the Government fixated on this date before and during the trial. Hembree not only could have anticipated testimony regarding his involvement in Greg Lake's drug operation before, during and after Kelli Hembree's pregnancy, but the Government's response clearly stated as much. Nothing precluded Hembree from using the birth of his own child as a yardstick from which to develop his alibi defense. The

Government's inability to establish a precise date in a two-year conspiracy did not leave Hembree in a defenseless vacuum.

We find no merit in this issue. The Government complied with the district court's order for a bill of particulars. Hembree was advised, by the indictment and the bill of particulars as filed, of what he was called upon to defend. *United States v. Anderson,* 799 F.2d 1438, 1441 (11th Cir. 1986). The essence of the charges is stated in the indictment and the bill of particulars "meets the test of specificity." *United States v. Bascaro,* 742 F.2d 1335, 1348 (11th Cir. 1984). Counts I and II recite the essential elements of the offense charged against Hembree – knowingly conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii). The bill of particulars identified Greg and Nodie Lake and Kelli Hembree as the Defendant's alleged co-conspirators. The indictment also correctly set forth the time span of the conspiracy: from January 1, 1997 until December 1998. It further partially described the locale with the allegation that the criminal activity took place "in the Northern District of Florida and elsewhere." We find that "taken as a whole, these allegations adequately set forth the offense charged." *Bascaro,* at 1349.

F. *Tillery* Instruction

Hembree's final claim of error as to the conspiracy count charges that the district court should have given a cautionary instruction in line with *United States v. Tillery,* 411 F.2d 644, 646 (5th Cir. 1969) that "accomplice testimony should be received with caution and reviewed with

skepticism." The court did not give such an instruction, nor did Hembree's counsel request the instruction.

In *Tillery,* the former Fifth Circuit found that a district court's failure to give an instruction that a jury should regard accomplice testimony with a high degree of skepticism was found to be plain error. The *Tillery* court, however, acknowledged that this is by no means a *per se* rule, and cautioned that "[t]he failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases." *Id.* at 647. Indeed, this Court has since stated:

> The failure to give an unrequested instruction cautioning the jury examine with a high degree of care the credibility of an accomplice/informer or drug addict may constitute reversible error if in the circumstances the omission is prejudicial or impairs the defendant's ability to present an effective defense . . . A reversal under the plain error standard is not warranted when an omitted cautionary instruction does not deprive the defendant of a fair trial or significantly prejudice his defense.

United States v. Solomon, 856 F.2d 1572, 1578 (11th Cir. 1988).

We believe that the instant case does not warrant reversal for the failure to give the unrequested jury instruction. Moreover, the district court informed the jury that it could consider a witness's inconsistent statements and convictions for a felony or a crime of dishonesty as evidence that a "witness testified falsely concerning an important fact." The district court further cautioned the jury about cooperative witnesses who abused addictive drugs during the time he or she testified about. Finally, the court warned that a witness giving government-friendly

testimony may have incentive to do so in exchange for immunity or favorable treatment in the witness's own case. Even if the district court committed error, which we do not believe it did, this series of instructions cured any error that flowed from the failure to give the unrequested instruction regarding accomplice testimony. This claim, too, lacks merit.

V. The Perjury Count

As with conspiracy count, Hembree raises his claims of error on the perjury count for the first time, and we review them for plain error.

A. Misjoinder of Conspiracy and Perjury Counts

Hembree first cites error with the joinder of his conspiracy and perjury counts in the same case. He argues that the two counts are not "similar" in character, meaning "[n]early corresponding; resembling in many respects; somewhat alike; having a general likeness." *United States v. Werner,* 620 F.2d 922, 926 (2d Cir. 1980) (quoting Webster's New International Dictionary (2d ed.)). *See* Fed.R.Crim.P. 8(a) (allowing for joinder of offenses against a single defendant that "are of the same or similar character"). In essence, Hembree claims that his perjury in the Lakes' trial was wholly unrelated to the conspiracy itself.

We think the Defendant's argument is slightly askew. Hembree's perjury was not independent of the overall conspiracy case. More importantly, evidence showed that the true reason for Hembree's perjury was his efforts to conceal the existence of the conspiracy, exonerate his co-conspirators, and insulate himself from prosecution. The

relationship between Hembree's perjured testimony and the conspiracy itself is evident. Hembree himself acknowledges that "had the perjury related to the investigation or prosecution of the drug conspiracy charged in count one, it might have been permissible to join the two." We agree. Hembree's false statements clearly fall within the ambit of statements relating to the furtherance of the conspiracy, and the obstruction of its investigation. *See, United States v. Blakely,* 960 F.2d 996, 998 (11th Cir. 1992) ("[s]tatements which serve a necessary part of a conspiracy by concealing it or impeding an investigation . . . [are] . . . statements made during and in furtherance of the conspiracy."). *See also, United States v. Avery,* 760 F.2d 1219, 1222 (11th Cir. 1989) (joinder of perjury and conspiracy counts proper where defendant falsely testifyied [sic] in grand jury proceedings about the underlying conspiracy.) We therefore find that the conspiracy and perjury charges "were sufficiently related so they can be deemed to be part of the same transaction." *Avery,* 760 F.2d at 1222. No error resulted from joining the two counts.

B. Stipulation Without Defendant's Consent

Hembree's last claim of error as to the perjury count asserts that the district court did not require the government to prove that his false statements were material to the Lake prosecution. Hembree first points to the district court's acceptance of his counsel's stipulation as to materiality of the false statements, and, second, that the court failed to instruct the jury on the requirement of unanimity that a particular statement was in fact material. Hembree again asserts that the district court's conduct in this instance amounted to plain error. We disagree.

First, the Defendant readily admits that he lied at the Lakes' trial, as alleged in the indictment. At the Lakes' trial, the Defendant adamantly denied any knowledge of the Lakes' involvement in the distribution of drugs, that he had ever seen cocaine or marijuana at the Lakes' home, and that he had ever consumed illegal drugs with the Lakes. Beyond the Defendant's own admission that this testimony was false, evidence at both the Lakes' and Hembree's trials established the falsity of his statements.

In addition to falsity, 18 U.S.C. § 1623 requires that the statements be material. To satisfy this element, it is enough if the statements had a "natural tendency to influence, or be capable of influencing a government function." *United States v. Johnson,* 139 F.3d 1359, 1363 (11th Cir. 1998). The government, however, is not required to prove reliance upon the alleged false statements to classify them as material. *Id.* Nor must the government demonstrate that the statements exerted actual influence over the jury; it is sufficient that the statements were intended to and had the capacity to influence. *United States v. Gregg,* 179 F.3d 1312, 1315 (11th Cir. 1999).

The Constitution's Due Process Clause and the Sixth Amendment require that the jury determine whether an allegedly false statement is "material" in a section 1623 prosecution. *United States v. Kramer,* 73 F.3d 1067, 1074 (11th Cir. 1996) (citing *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). In the instant case, Hembree's counsel stipulated to the materiality of the statement. Although Hembree couches his assertion of error in the fact that he did not consent to the stipulation of materiality, it seems that Hembree also "urges us to adopt a per se reversal rule for *Gaudin* violations." *Kramer*, 73 F.3d at 1074. We decline to do so.

Although Hembree was a "silent defendant," it is his burden to establish a "plain, prejudicial, and disreputable" error. *United States v. Vonn*, 535 U.S. 55, 59, 122 S.Ct. 1043, 1046, 152 L.Ed.2d 90 (2002). Defense counsel stipulated (and the government produced conclusive evidence to show) that Hembree's disputed testimony was material. This case is distinguishable from other cases finding the requisite prejudice element of plain error. *See Kramer,* 73 F.3d at 1075, n.18 (listing cases: *United States v. Viola,* 35 F.3d 37 (2d Cir. 1994) (prejudice where insufficient evidence to prove all elements of crime) *United States v. Rogers,* 18 F.3d 265 (4th Cir. 1994) (prejudice where no finding, by either judge or jury, on sufficiency of evidence for necessary element of crime); *United States v. Jones,* 21 F.3d 165 (7th Cir. 1994) (prejudice where government presented no evidence to establish necessary element of offense); *United States v. Retos,* 25 F.3d 1220 (3d Cir. 1994) (prejudice where evidence on essential element not conclusive)).

We think that Hembree's argument, especially here, would be better presented as a claim of ineffective assistance of counsel in a collateral proceeding rather than attempting to meet the strictures of plain error on direct appeal.[4] The strategic play employed by defense counsel in stipulating the materiality element would necessarily involve facts outside the original record. The issue is more appropriately raised in collateral proceedings than on direct appeal, except in exceptional cases where the

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[4] As we stated *supra,* Hembree's appeal lists a "myriad" errors which his trial counsel failed to object to, and thereby prejudiced his ability to receive a fair trial. We reiterate our previous admonishment that such claims are more appropriately reserved for collateral review.

obvious result would be a plain miscarriage of justice or inconsistent with substantial justice. *See United States v. Martin,* 59 F.3d 767 (8th Cir. 1995).

We emphasize that, given the evidence, no miscarriage of justice occurred here. While we question whether the fairness, integrity or public reputation of judicial proceedings were actually seriously affected due the matter of materiality being handled by stipulation of the Defendant's counsel, it appears from the record before us, that Hembree's denials of criminal knowledge – which his own jury found to be lies – were capable of influencing the Lakes' jury. This would satisfy the requisite materiality element. Thus, a jury could find, based on the evidence, that Hembree's statement were material. Because Hembree has failed to show that the stipulation and the failure to submit the issue of materiality to the jury affected the outcome of his trial, we affirm the perjury and conspiracy convictions.

VI. Sentencing

Hembree makes two claims of error with regard to the manner in which the district court determined his final sentence. Hembree argues that the court failed to properly credit him for acceptance of responsibility in the failure to appear case, and that it misapplied U.S.S.G. § 2J1.6, resulting in his obstructive conduct being counted twice. Hembree objected on both grounds at the time of sentencing, and the district court overruled them.

A. Acceptance of Responsibility

We review "a district court's determination of acceptance of responsibility for clear error." *United States v. Dodd,* 111 F.3d 867, 870 (11th Cir. 1997). Pursuant to U.S.S.G. § 3E1.1, a district court may grant a two- or three-level reduction if the defendant timely accepts responsibility for his offenses. The reduction, however, is not automatic, and the district court's determination is afforded a large degree of latitude. U.S.S.G. § 3E1.1, cmt. n.3, 4. *See also United States v. Pritchett,* 980 F.2d 816, 824 (11th Cir. 1990). We have previously held that "[t]o be entitled to an adjustment, a defendant must accept responsibility for *each* crime to which he is being sentenced. *United States v. Bourne,* 130 F.3d 1444, 1447 (11th Cir. 1997) (emphasis added).

Hembree did not accept responsibility for each of his crimes. The district court pointed to three instances of obstruction of justice: Hembree's false testimony at the Lakes' trial, his false testimony at his own trial (including at least 22 distinct episodes of testifying falsely), and his failure to appear for sentencing. Hembree only accepted responsibility for failing to appear at sentencing. He made no attempt to accept blame for committing perjury. Although the district court declined to give Hembree the § 3E1.1 reduction, it did consider Hembree's acceptance when it imposed the ultimate sentence of 90 months. The 90 months reflected the minimal sentence of 12 months for failing to appear, and 78 months, reduced from the original 80 months on the perjury and conspiracy counts. Therefore, Hembree has failed to show that the district court clearly erred in refusing to give him a downward adjustment under § 3E1.1.

B. Imposition of Consecutive Sentence

The second sentencing error Hembree alleges is that the district court misapplied U.S.S.G. § 2J1.6 by imposing a sentence on the grouped offenses that was within the guideline range and then imposing a separate, consecutive sentence for his failure to appear. We review *de novo* a district court's sentencing determination when it involves primarily a legal interpretation of a guideline. *See United States v. Williams*. 340 F.3d 1231, 1239 (11th Cir. 2003).

When a defendant is convicted of an offense involving obstruction of justice, in addition to an underlying offense, the guidelines direct: (1) that the count for the obstruction be grouped with the count for underlying offense, U.S.S.G. § 3D1.2(c); and (2) that the base offense level for that grouping will be set at the offense level of the underlying offense, increased by two levels, pursuant to U.S.S.G. § 3C1.1, cmt. n.8.[5] In conjunction with a conviction for an underlying offense, the failure to appear conviction is treated under § 3C1.1 as an obstruction to the underlying offense. U.S.S.G. § 2J1.6, cmt. n.3. A further upward departure may be appropriate when a defendant like Hembree here, is convicted of both the underlying offense and failing to appear and committed additional acts of obstructive behavior during the investigation, prosecution,

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[5] The commentary to U.S.S.G. § 3C1.1 directs that this two-level upward adjustment "applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant." U.S.S.G. § 3C1.1, cmt. n.1. Here, Hembree's perjury occurred during the investigation and prosecution of the conspiracy and it related to Greg Lake's case, who was a coconspirator.

or sentencing of the instant offense. U.S.S.G. § 2J1.6, cmt. n.4. (emphasis added).

Title 18 United States Code Section 3146 directs that any term of imprisonment imposed for failure to appear must be consecutive to the sentence imposed for any other offense. 18 U.S.C. § 3146(b)(2). The Sentencing Guidelines then instruct that the district court must group the underlying offense with the failure to appear, and that the combined sentence will be fashioned to comply with both 18 U.S.C. § 3146 and U.S.S.G. § 5G1.2 (Sentencing on Multiple Counts of Conviction). *See* U.S.S.G. 5G1.2, cmt. n.1; U.S.S.G. § 2J1.6, cmt. n.3. The total punishment, then, is the "combined length of the sentences," which is "determined by the adjusted combined offense level." U.S.S.G. § 5G1.2, cmt. n.1.

Hembree claims that the Sentencing Guidelines required the district court to establish a total sentencing range for all offenses and then sentence him so that the cumulative sentence for the grouped offenses was within the guideline range. Calculating Hembree's sentence, however, was complicated by the fact that he engaged in three separate instances of obstruction, two of which resulted in convictions. The district court should have applied an obstruction-of-justice enhancement for the perjury, as directed by the guidelines. Instead, the district court based the obstruction enhancement on Hembree's perjury at his own trial, resulting in a two-level increase. The district court then applied a two-level reduction under the safety-valve provision, returning Hembree's offense to 26. Finally, the district court applied yet another upward departure of two levels based on the false declaration and failure to appear, resulting in a final offense level of 28.

Had the district court correctly applied the guidelines, without taking the failure to appear conviction into consideration, Hembree's offense level would have been 26, the base offense level for conspiracy. A two-level enhancement would then have been applied for the perjury conviction. The offense level should have returned to 26 again, reflecting the two-level safety-valve reduction. At this point, the offense level of 26 would not incorporate either: (1) the failure to appear; or (2) Hembree's perjury at his own trial. In this case, an obstruction of justice enhancement for failing to appear was unavailable because that enhancement already had been employed due to the perjury conviction. The only available option to reflect the remaining instances of obstruction was an upward departure, which would be appropriate under U.S.S.G. § 2J1.6, cmt. n.4. Had the district court imposed only a two-level enhancement for the failure to appear or Hembree's perjury at his own trial, which would be permissible under the guidelines, the total offense level would have been 28, the same level the district court reached through misapplication of the guidelines.

Hembree further argues that the district court failed to find a sentence within the guideline range and separate it into two components: one for the underlying offense, and one for the failure to appear. Instead, Hembree claims, the court imposed independent sentences by determining a range for each indictment. Hembree complains that this resulted in the court improperly double-counting the obstructive conduct for his failure to appear case by: (1) applying an upward departure, which increased the offense level for grouped offenses an additional two levels; and (2) independently calculating the offense level for the failure to appear and calculating the offense level for the

failure to appear and imposing a consecutive sentence on that count.

We note that Hembree correctly finds error with the district court's calculation method for the failure to appear conviction. The district court should have *first* selected a total punishment within the guideline range of 78 to 97 months, and, *second* divided that total punishment to satisfy the consecutive sentence requirements of 18 U.S.C. § 3146(b)(2). Instead, the district court calculated the offense levels independently for each offense, finding that it could not depart from either a 78-month sentence for conspiracy or a 12-month sentence for failing to appear. This error, however, was harmless. The total 90-month sentence was well within the guideline range and in accordance with the consecutive sentence requirements of 18 U.S.C. § 3146 and the "total punishment" requirement of U.S.S.G. § 5G1.2.

Hembree's final argument regarding an incorrect sentence for the failing to appear charge claims that the district court double-counted his failure to appear charge by (1) upwardly departing and (2) applying a consecutive sentence for the same conduct. The Sentencing Guidelines specifically permit an enhancement for obstructive behavior in conjunction with a consecutive sentence. *See* U.S.S.G. § 2J1.6 cmt. n.3.

In sum, although the district court misapplied the guidelines when fashioning Hembree's sentence, a correct application of the guidelines would render an identical sentence. Accordingly, we affirm the district court's sentence.

VII. Conclusion

Upon review of the record and consideration of the parties' briefs, we find no reversible error in this case. The district court did not commit plain error during the course of the trial that would warrant overturning Hembree's convictions. Furthermore, although the district court made some technical errors in calculating Hembree's offenses, the final sentence fit a correct application of the guidelines. We therefore affirm the Defendant's convictions and sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA ~~Case No: 3:02CR70-001 RV~~

-vs-

GREGORY WADE HEMBREE

Case No:
3:03CR113-001 RV
Defendant's Attorneys
(Retained)
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JUDGMENT IN A CRIMINAL CASE

(Filed Nov. 4, 2003)

The defendant was found guilty of Counts One and Two of the Indictment in Case No. 3:02CR70-001 on January 8, 2003; and pled guilty to Count One of the Indictment in Case No. 3:03CR113-001 on October 3, 2003. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such counts which involve the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii) and and 846	Possess with intent to Distribute 500 Grams or more of Cocaine	12/1998	One (3:02CR 70-001)

18 U.S.C. § 1623	False Declaration	12/08/1999	Two (3:02CR 70-001)
18 U.S.C. §§ 3146(a)(1), (b)(1)(A)(i), and (b)(1)(A)(ii)	Failure to Appear	03/28/2003	One (3:03CR 113-01)

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No: 264-57-2954
Defendant's Date of Birth: 03/10/1958
Deft's U.S. Marshal No: 05474-017

Date of Imposition of Sentence:
October 31, 2003

Defendant's Address:
54 North Lake Drive
Santa Rose Beach, FL 32459

/s/ Roger Vinson
ROGER VINSON
CHIEF U.S. DISTRICT JUDGE

November 4, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 90 months. This term is comprised of 78 months on Count One and 60 months on Count Two (Case 3:02CR70-001), with the terms to run concurrently one with the other; and 12 months (Case 3:03CR113), with the term to run consecutively to the terms imposed in Case 3:02CR70-001.

The defendant is remanded to the custody of the United States Marshal.

The Court recommends to the Bureau of Prisons:

The defendant shall participate in a Residential Drug Treatment Program, or such similar program, for treatment of substance abuse as deemed eligible, at the discretion of the Bureau of Prisons.

Designation to FCI at Marianna, Florida for service of sentence, as deemed eligible by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years. This term is comprised of 4 years on Count One and 3 years on Count Two (Case 3:02CR70-001), and 3 years (Case 3:03CR113-001), with the terms to run concurrently one with the other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer;

2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment, unless otherwise directed by the probation officer;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. Any unpaid fine balance shall become a condition of the defendant's term of supervised release, and the defendant shalt make monthly installment payments

of not less than $25.00 per month, to commence three months after release from imprisonment.

2. As deemed necessary by the Probation Officer, the defendant shall participate in a program of drug treatment which may include testing to determine if the defendant is using drugs.

3. The defendant shall cooperate with the Probation Office and/or any state agency responsible for the establishment and enforcement of child support payments and shall make all required child support payments.

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shalt be made payable to the Clerk, U.S. District Court, and mailed to that office at 111 North Adams Street, Tallahassee, Florida 32301. Payments may be in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. Unless otherwise ordered below, the defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of $300.00 is imposed.

FINE

A fine of $1,000.00 is imposed. In the interest of justice, interest on the fine is hereby waived.

RESTITUTION

No restitution is imposed.

CRIMINAL FORFEITURE

The Criminal Forfeiture ordered entered at defendant's sentencing on October 31, 2003, as to $30,000.00 in United States currency is incorporated by reference.

SCHEDULE OF PAYMENTS

SUMMARY

Special Monetary Assessment	Fine	Restitution
$300.00	$1,000.00	-0-

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

The $300.00 monetary assessment shall be paid immediately. Any payments of the monetary assessment and fine made while the defendant is incarcerated shall be made through the Bureau of Prisons' inmate Financial Responsibility Program. Any payments of the fine while the

defendant is incarcerated shall be voluntary, and not required.

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendants economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

STATEMENT OF REASONS
(NOT FOR PUBLIC DISCLOSURE)

The court adopts the factual findings and guideline application in the presentence report except:

– The Court ruled that the defendant was entitled to a two level reduction pursuant to § 2D1.1(b)(6) because he meets the criteria set forth In § 5C1.2. The Court determined that the defendant "clearly" met four of the five qualifications for the provision; however in regards to #5, the Court determined that the defendant did not have the opportunity to provide all "truthful" information to the government,

and because he qualified for all other sections, granted the defendant a two level reduction pursuant to § 2D1.1(b)(6).

> As a result, Paragraph 30 reflected a (-2) for § 2D1.1(b)(6), and the following paragraphs were affected:

Paragraph 34. Adjusted Offense Level becomes a 26
Paragraphs 36 and 38. Total Offense Level becomes a 26

– The Court also found the defendant had obstructed justice on three separate occasions. The Court acknowledged and amended paragraph 33 to reflect the defendant's testimony during his own trial as obstructive behavior which should be noted in this section of the report and not the obstruction for the defendant's testimony during the Gregory and Nodie Lake trial. The Court noted the obstruction for the defendant's testimony during the Gregory and Nodie Lake trial would be taken into consideration in factors that warrant departure as an additional obstruction.

– Although the defendant's Total Offense Level was a 26, the Court departed two levels based upon the defendant's obstructive behavior in his testimony during the Gregory and Nodie Lake trial and his failure to appear based upon § 2J1.6. Therefore, the defendant's total offense level became a 28 (with a criminal history category of I, the defendant's guideline range became 78 to 97 months).

– The Court further ruled the defendant was entitled to acceptance of responsibility in Case No 3:03CR113-001, and took acceptance of responsibility into account during sentencing.

– During sentencing, the Court noted a two level upward departure from the guideline range is appropriate to take into account the defendant's behavior for multiple obstruction of justice conduct and is also contemplated by § 2J1.6, Commentary notes 3 and 4, and is an encouraged departure by the U.S. Sentencing Commission and is warranted in this case. The Court noted the defendant received the benefit of § 5C1.2 and sentenced the defendant within the guideline range taking into account the defendant's acceptance of responsibility in Case No. 3:03CR113-001.

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: 3:02CR70

Count 1:	3 to 5 years
Count 2:	2 to 3 years
3:03CR113	
Count 1:	2 to 3 years

Fine Range: $12,500.00 to $2,000,000.00

Fine waived or below the guideline range based upon inability to pay.

No restitution imposed.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

/s/ Roger Vinson
ROGER VINSON
CHIEF U.S. DISTRICT JUDGE

November 4, 2003

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16001-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY WADE HEMBREE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Jul. 23, 2004)

ORDER:

Appellant's motion to file a supplemental brief in order to raise issues pursuant to *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) is DENIED. *See U.S. v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001); *U.S. v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *U.S. v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

/s/ Frank M. Hull
UNITED STATES CIRCUIT
JUDGE

APPENDIX D

[PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16001

D.C. Docket No. 02-00070-CR-3-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY WADE HEMBREE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(AUGUST 23, 2004)

Before DUBINA, BLACK and PRYOR, Circuit Judges.

BY THE COURT:

On July 23, 2004, this court denied Appellant's motion for leave to file a supplemental brief pursuant to *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). Appellant now files a motion seeking to either file a substitute principal brief, or seeks this court's reconsideration of its July 23, 2004, Order. Appellant is attempting to do indirectly what he cannot do directly – raise a *Blakely* issue when it was not raised in his initial brief.

This court's precedent establishes that a party may not raise through a supplemental brief an issue not previously raised in his principal brief. *See U.S. v. Curtis,* ___ F.3d ___, No. 02-16224 (11th Cir. August 10, 2004); *U.S. v. Levy,* ___ F.3d ___, No. 01-17133 (11th Cir. August 3, 2004); *U.S. v. Ford,* 270 F.3d 1346, 1347 (11th Cir. 2001); *U.S. v. Ardley,* 242 F.3d 989, 990 (11th Cir. 2001); *U.S. v. Nealy,* 232 F.3d 825, 830 (11th Cir. 2000). Therefore, to the extent that Appellant seeks reconsideration of the July 23, 2004, Order, his motion is **DENIED**.

To the extent that Appellant's motion seeks to file a substitute principal brief for the purpose of raising a *Blakely* issue, we hold that such *Blakely* motions to file a substitute or amended principal brief should be construed as motions to file a supplemental brief and should be denied. Such *Blakely* motions must be construed for what they are. Otherwise, this court would be permitting Appellant, through a motion for a substituted or amended principal brief, to circumvent improperly our above precedent and to do indirectly what Appellant cannot do directly. Nor will we *sua sponte* order the filing of substituted or amended principal briefs. To do so is impermissible as it too would circumvent improperly the above precedent of this court that forbids raising new issues by supplemental briefs. Accordingly, Appellant's motion to file a substitute principal brief is also **DENIED**.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16001-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY WADE HEMBREE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Feb. 7, 2005)

Before: CARNES, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THE UNITED STATES
OF AMERICA,
Plaintiff,

Case Nos. 3:02cr70-RV
3:03cr113-RV

vs.

GREGORY WADE HEMBREE,
Defendant.

TRANSCRIPT OF SENTENCING

The above-entitled matter came on to be heard before the Honorable ROGER VINSON, Chief United States District Judge, in the United States Courthouse, Pensacola, Florida, on the 31st day of October, 2003, commencing at 9:02 a.m. APPEARANCES:

For the Government: RANDALL J. HENSEL
Assistant United States Attorney
21 East Garden Street, Suite 400
Pensacola, FL 32502

For the Defendant: RONALD W. JOHNSON
Attorney at Law
Kinsey, Troxel, Johnson & Walborsky
438 East Government Street
Pensacola, FL 32502-6132

- and -

WILLIAM MALLORY KENT
Attorney at Law
24 North Market Street, Suite 300
Jacksonville, FL 32202

* * *

[68] something that I determine that had to be applied for that case.

So the only question is with respect to the sentence in case cr70, if I can go below the guideline to impose a sentence on that without that being a departure. And, frankly, I had assumed that I had to impose a sentence within the guideline range on that particular case, but I may be mistaken. I'm not sure.

MR. KENT: I think – right, Judge. I think in that further commentary on the next page about how to deal – how the Sentencing Commission anticipated dealing with the statutory mandate of consecutive sentence, because you could take that range, and I believe you take the 80, and you break that up, and it's not a departure then, because you are carrying out the intent of the Sentencing Commission, both to satisfy the statutory mandate of consecutive sentence, but also to take into the Sentencing Commission's view that you group it, and that in determining the offense level for the whole sentence, you are not doing a consecutive sentence.

THE COURT: Well, I understand what you are saying. Let me ask Mr. Constantakos.

Do I have the option to go below 78 months in imposing a sentence on – in case cr70 without calling it a departure, because it's not my intent to depart for Mr. Hembree.

[69] MR. CONSTANTAKOS: No, sir, Judge. That's underlying the case.

THE REPORTER: I'm sorry, but I can't hear you.

MR. CONSTANTAKOS: No, there would be no departure. Acceptance of responsibility is actually coming off the failure to appear case.

THE COURT: All right. But it's – I have given him – I have given him 12 months on that. Actually, I could – I could probably reduce the – the consecutive portion on 113 and accomplish that same thing.

MR. CONSTANTAKOS: Exactly, Judge.

MR. KENT: Judge, I think if you don't do that, you really haven't given him the benefit of the adjustment for the superacceptance, slash acceptance.

THE COURT: Mr. Hensel?

MR. HENSEL: I don't find it superacceptance, never have. You will never convince me that –

THE COURT: Well, I'm not – I'm not finding that it's superacceptance, but I do want to give him some benefit of that, for whatever it's worth.

MR. HENSEL: Give him two months, Judge. Go to 78. Don't do a departure. Go to 78 on the drug case and give him 12 months consecutive on the failure to appear.

MR. JOHNSON: Give him one level for acceptance, since the government is not satisfied with anything.

[70] THE COURT: Let me ask Mr. Constantakos one more time. What?

MR. CONSTANTAKOS: Judge, taking the failure to appear case by itself.

THE COURT: Yes.

MR. CONSTANTAKOS: His guideline range with the acceptance was a level 13, which is 12 to 18 months.

THE COURT: With acceptance?

MR. CONSTANTAKOS: With the acceptance.

THE COURT: All right.

MR. CONSTANTAKOS: You have gone to the low end of the guideline range in that case.

THE COURT: All right. Now, is there a way to tell me what the other case is by itself?

MR. CONSTANTAKOS: Judge, by itself, the other case was a level 26.

MR. KENT: But, Judge, the problem with that is, that is the double counting.

THE COURT: Let – let him finish, Mr. Kent.

MR. CONSTANTAKOS: It's 68 – 63 to 78. Your Honor then imposed a two-level adjustment for the obstruction which brought him up to 78 to 97.

THE COURT: Correct.

MR. CONSTANTAKOS: By itself, without the acceptance, he would have been 63 to 78. The guidelines ordered an [71] increased upward departure because of the obstruction, brought him up to 97 – I'm sorry, 78 to 97.

THE COURT: Well, let me ask the question again. Without calling it a departure, can I impose a sentence below 78 months in Case No. cr70?

MR. CONSTANTAKOS: No, Judge, not without declaring it a departure.

THE COURT: And in Case cr113, can I impose a sentence below 12 months consecutive without calling that a departure?

MR. CONSTANTAKOS: No, Judge. Again, the guidelines for that case, by and in and of itself, is 12 to 18 months.

THE COURT: Well, let me do it this way. I am going to take Mr. Hensel's suggestion and reduce the sentence in cr70, Count One, to 78 months. Count Two remains at 60 months concurrent. Case No. cr113 remains 12 months, consecutive. And the total sentence is 90 months. And everything else remains in full force and effect.

MR. KENT: Judge, just for the record, may I say this? My objection is I do think you are double counting by giving – he got two levels obstruction on the underlying case, then you gave him an additional two-level upward departure because there was obstructive conduct that's not fully accounted for, because he's now got a failure to appear in addition to the original obstruction. And now, in addition –

* * *

APPENDIX G

UNITED STATES COURT APPEALS
ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

v.

GREGORY WADE HEMBREE /

Case Number
03-16001-H

APPELLANT HEMBREE'S REQUEST FOR SUPPLEMENTAL BRIEFING

Pursuant to Rule 27-1, Federal Rules of Appellate Procedure, Appellant Gregory Wade Hembree, by and through his undersigned counsel, WILLIAM MALLORY KENT, respectfully requests permission to file a supplemental brief to address the impact of *Blakely v. Washington*, ___ S.Ct. ___, 2004 WL 1402697 (June 24, 2004), on the sentencing in this case.

We read *Blakely* to prohibit a district court judge at sentencing, after trial by jury and a general guilty verdict, from determining sentencing guideline factors which were not alleged in the indictment and proven beyond a reasonable doubt to the jury as determined by special verdicts.

In Hembree's case the court imposed an upward adjustment in the guidelines based on Hembree's alleged perjury at his own trial where he testified in his own defense. This alleged perjury was treated as a guideline factor, and over Hembree's objection was scored as obstruction, increasing his offense level by two levels and accordingly increasing his sentence by approximately twenty percent.

This very evil was noted by Justice Scalia in footnote 11 of his majority opinion in *Blakely*:

> Another example of conversion from separate crime to sentence enhancement that Justice O'CONNOR evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post,* at ----- – -----6-7. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136-138 (1769)), is unclear.

Hembree is entitled to application of *Blakely* to his case, because it is not yet final on appeal. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n. 6 (1987).

Admittedly, the above *Blakely* challenge was not raised in the trial court, or in the prior briefing to this Court on appeal. The failure to raise the issue at trial subjects it to "plain error" review. *United States v. Cotton,* 535 U.S. 625, 122 S. Ct. 1781, 1785-86 (2002). Sentencing a defendant in violation of *Blakely* plainly is "error," and the error is "plain," regardless of the fact that *Blakely* involved a state sentencing system and Hembree was sentenced under the federal sentencing guidelines. *See id.* (Court accepts government concession that federal sentences so clearly violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), a case involving New Jersey law, as to constitute "plain" error). *Blakely's* principle is clear, and the violation of a clear principle gives rise to plain error. See *United States v. Brown*, 352 F.3d 654, 664

(2d Cir. 2003) (plain error can arise from a deviation from "well-settled legal principles as much as well-settled legal precedents") (emphasis in original); *see also United States v. Richardson,* 166 F.3d 1360, 1361 (11th Cir. 1999) (finding plain error on issue of first impression in the circuit on a matter where only one interpretation of the law was reasonable). *Blakely* error also satisfies the remaining prongs of plain error. It affects a defendant's "substantial rights," and it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 633, 117 S.Ct. at 1785.

A defendant's substantial rights are affected, for plain error analysis purposes, when a sentence exceeds the authorized maximum. *See United States v. Hester*, 287 F.3d 1355, 1357 (11th Cir. 2002). Here, it was error to sentence Hembree above the applicable guideline range for which the jury verdict established "essential" facts. *Blakely,* 2004 WL 1402697 at * 9.

Fed. R. App. P. 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." (Emphasis added). The "court" referenced in the rule can be an appellate court, even an *en banc* court, not just a trial court. *See Brotherhood of Carpenters & Joiners of America v. United States,* 330 U.S. 395, 412, 67 S.Ct. 775, 784 (1947) ("We have the power to notice a 'plain error' though it is not assigned or specified."). *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 1549 (1997) held that an error is considered "plain" if it is plain at the time of appeal. Appellant's case was on appeal when *Blakely* was decided. Thus, omission of *Blakely* issue from the initial brief should not preclude this Court from noticing the now plain error which infects his sentence.

Moreover, when it comes to noticing "plain error," this Court's jurisdiction is not constrained by the actions or omissions of litigants. Fed. R. App. P. 52(b) delegates to this Court the responsibility for finding "plain error." This is an important responsibility, especially when it affects the length of time a person remains incarcerated, deprived of basic liberties. This responsibility, therefore, must be carefully balanced against the need to require parties to present the "right" issues on appeal. *See Thomas v. Crosby,* 371 F.3d 782, ___, 2004 WL 1162208, *___ (11th Cir. May 26, 2004) (even if this Court erred by *sua sponte* asking the parties to proceed on a different issue than the one raised in their briefs, "any such error was not jurisdictional"); *id.* at ___ (Tjoflat, J. concurring) (drawing the parallel between an appellate court's power, when justice requires, to raise new issues, and its power to notice "plain error"; "the scope of a petitioner's rights has no bearing on this court's power").

In the instant case, the balance should be struck in favor of noticing the "plain error." Procedural bars are meant to preclude consideration of issues which "were not raised [by litigants] in a timely and appropriate fashion." *United States v. Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in the denial of *en banc* rehearing). But when, as here, the timing (and content) of the announcement of a new rule of law is unanticipated by all (including the lower courts), and occurs *after* the appeal is fully briefed, the rationale for faulting parties for failing to raise the issue before in a "timely and appropriate fashion" has no force. Further, waiver – unlike forfeiture – is defined as "the *intentional* relinquishment or abandonment of a *known* right." *United States v. Olano,* 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993) (citations omitted).

Forfeiture subjects the error to "plain error" review. *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777.

The foregoing policy arguments take on a greater dimension in light of *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct, 708, 712 n. 6 (1987), which made new constitutional rules automatically applicable to criminal cases not yet final, and defined "final" as "a case in which . . . the availability of appeal [is] exhausted: the instant case, the availability of appeal [is] not exhausted: the instant motion for supplemental briefing is being filed prior to this Court setting the appeal for oral argument. Cases only become final for the *Griffith* rule by the conclusion of direct review or the expiration of the time for seeking certiorari review or denial of certiorari. *See also Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir. 2002) (judgment becomes "final" on the date of the expiration of the deadline for seeking certiorari review in the Supreme Court).

Moreover, *Griffith*'s rule regarding the applicability of Supreme Court case law to pending cases arose in part out of the "nature of judicial review" under the Constitution. 479 U.S. at 322-23, 107 S. Ct. at 713. In other words, pursuant to the inherent powers of federal courts under Article III, adjudicatory authority to apply a new rule of constitutional law becomes vested as of the moment the new rule is rendered, for all pending cases. As of that moment, the litigants in pending cases are free to waive or forfeit whatever rights the new rule may have conferred upon them, by for example failing to raise them in a "timely and appropriate fashion." But here, the defendant is asserting his *Blakely* claim in the instant motion in a timely manner.

For the foregoing reasons, Appellant Hembree requests permission to file a supplemental brief on the *Blakely* issue.

Respectfully submitted,
THE LAW OF OFFICE OF
WILLIAM MALLORY KENT

/s/ William M. Kent
WILLIAM MALLORY KENT
Fla. Bar No. 0260738
24 North Market Street
Suite 300
Jacksonville, Florida 32202
904-355-1890
904-355-0602 Fax
kent@williamkent.com

Certificate of Service

I hereby certify that a copy of the foregoing has been sent by U.S. mail to Curtis Dunn, Esq., and Randall Joseph Hensel, Esq., Assistant United States Attorneys, 21 East Garden Street, Suite 400, Pensacola, Florida 32501 this 1st day of July, 2004.

/s/ William M. Kent
William Mallory Kent

APPENDIX H

UNITED STATES COURT APPEALS
ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

v. **Case Number 03-16001-H**

GREGORY WADE HEMBREE /

APPELLANT HEMBREE'S REQUEST TO FILE SUBSTITUTE PRINCIPAL BRIEF OR IN THE ALTERNATIVE, RECONSIDERATION OF THIS COURT'S ORDER DENYING SUPPLEMENTAL BRIEFING FILED JULY 23, 2004

Appellant Gregory Wade Hembree, by and through his undersigned counsel, WILLIAM MALLORY KENT, previously requested permission to file a supplemental brief to address the impact of *Blakely v. Washington*, ___ S.Ct. ___, 2004 WL 1402697 (June 24, 2004), on the sentencing in this case. The government filed an opposition to the requested supplemental briefing, citing, *inter alia, United States v. Nealy,* 232 F.3d 825 (11th Cir. 2000).

This Court, by order of Judge Hull, entered an order July 23, 2004 denying appellant's motion for supplemental briefing.

It has come to the attention of counsel that requests for supplemental briefing appear to have been granted in other cases, notably by the Honorable Susan Black, in *United States v. Camacho-Ibarguen*, No. 04-11155, and *United States v. Diaz,* No. 04-10453. In those cases, Judge Black permitted the supplemental briefing by means of granting leave to file a "substitute principal brief."

Accordingly, Hembree requests permission to file a substitute principal brief to address the issues raised by *Blakely.*

Alternatively, we respectfully request this honorable Court reconsider its order denying the request for supplemental briefing. *Nealy* is inconsistent with the Supreme Court's rule of entitlement under *Griffith v. Kentucky*, 479 U.S. 317 (1987), that a defendant in a criminal case is entitled to the application of a new rule of constitutional law announced by the Supreme Court if the defendant's case is not yet final on appeal. This Court may not bar application of a new rule of constitutional law to a case not yet final on appeal merely by citing to a procedural rule that governs the filing of briefs. *Cf. Peary v. Lynaugh,* 109 S.Ct. 2934 (1989).

Other courts around the United States have already allowed supplemental briefing on *Blakely,* including the Eight Circuit, in *United States v. Mooney,* 2004 WL 1636960 (8th Cir. 2004), which remanded a case to the district court for consideration of the *Blakely* issues and supplemental briefing.[1] The Ninth Circuit has considered *Blakely* issues *sua sponte* in *United States v. Ameline,* 2004 WL 1635808 (9th Cir. 2004).

Indeed, as Judge Tjoflat wrote in his dissent to the denial of rehearing *en banc* in *United States v. Ardley*, 273 F.3d 991, 996 (11th Cir. 2001), the Eleventh Circuit stands alone in this interpretation of retroactivity principles. Judge Tjoflat has said it far better than we can attempt to

[1] We would request a similar remand if this Court would permit.

imitate, so we rely on his dissent in *Ardley* for our position here.

Accordingly, Defendant-Appellant Hembree respectfully requests that this honorable Court permit Hembree to file a substitute principal brief raising the *Blakely* issue, or that this Court reconsider its order denying supplemental briefing on *Blakely*, or that this Court consider the application of *Blakely* to the Hembree case *sua sponte*.

Respectfully submitted,
THE LAW OF OFFICE OF
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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2004, a copy of the foregoing was furnished to Curtis Dunn, Esquire, Assistant United States Attorney, Office of the United States Attorney, 21 East Garden Street, Suite 400. Pensacola, Florida 32501, by United States Postal Service, first class mail, postage prepaid.

/s/ William M. Kent
William Mallory Kent

APPENDIX I

Case No. 03-16001-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES,

Appellee,

v.

GREGORY WADE HEMBREE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

**PETITION FOR REHEARING EN BANC
OF APPELLANT GREGORY WADE HEMBREE**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party,

Trial Judges
Hon. Frances H. Stacy, U.S. Magistrate Judge
Hon. Roger Vinson, Chief U. S. District Court Judge

Prosecuting Attorneys
Curtis Dunn, Esq., Assistant United States Attorney
Randall Joseph Hensel, Esq., Assistant United States Attorney

Probation Officer
Michael Constantakos

Defense Attorneys
Drew S. Pinkerton, Esq. (trial counsel for Defendant)
Ronald W. Johnson, Esq. (post conviction trial counsel for Defendant)
William Mallory Kent, Esq. (post conviction trial counsel for Defendant)
John S. Mills, Esq. (appellate counsel for Defendant)

Defendant
Gregory Wade Hembree

By: John S. Mills
John S. Mills

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

> Whether the Appellant can challenge the constitutionality of the federal sentencing guidelines on direct appeal in light of *Blakely v. Washington* when he did not raise the issue until after he filed his initial brief, but before the case was decided.

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STATEMENT OF THE ISSUES

1) Whether the district court's error in determining the applicable sentencing range was harmless where the court sentenced the Appellant to the lowest sentence available under the erroneous range.

2) Whether the Appellant can challenge the constitutionality of the federal sentencing guidelines on direct appeal in light of *Blakely v. Washington* when he did not raise the issue until after he filed his initial brief, but before the case was decided.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION

After a jury trial, the Appellant was convicted of conspiracy to possess cocaine with intent to distribute and perjury. (Exh. A at 2.) He subsequently pled guilty to a charge of failing to appear at his sentencing hearing. (*Id.*) The district court ultimately determined that his total guideline range for the three offenses was 78 to 97 months. (Exh. A at 33.) Because 18 U.S.C. § 3146(b)(2)

requires that a term of imprisonment for a failure to appear must be consecutive to the sentence for the underlying offense, the district court determined that it would have to impose a second sentence to run consecutively for the failure to appear. (Exh. A at 30, 32-33.) If imposed the lowest possible sentence for both components – 78 months for the conspiracy/perjury and an additional 12 months (the statutory minimum) for the failure to appear. (Exh. A at 33.)

The Appellant appealed his conviction and sentence. Less than three months after the Appellant filed his initial brief, the Supreme Court decided *Blakely v. Washington,* 124 S. Ct. 2531 (2004). Before filing his reply brief, the Appellant moved to supplement or amend his initial brief to include a "plain error"[1] constitutional challenge to the application of the sentencing guidelines. In a published opinion, the Court held that an appellant is barred from raising a *Blakely* argument on appeal unless it was included in the initial brief.[2] *United States v. Hembree,* 381 F.3d 1109 (11th Cir. 2004) (Exhibit B).

In its ultimate judgment, filed on December 8, 2004, the Panel affirmed the Appellant's conviction and sentence in all respects. (Exhibit A) The Panel agreed with the Appellant on one of his sentencing arguments. Specifically, it held:

> The district court should have *first* selected a total punishment within the guideline range of 78

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[1] This argument had not been made at the sentencing hearing.

[2] This petition is timely because the deadline for moving for rehearing en banc runs from the time of the judgment. 11th Cir. R. 35-2.

> to 97 months, and, *second,* divided that total punishment to satisfy the consecutive sentence requirements of 18 U.S.C. § 3146(b)(2).

(Exh. A at 33.) The Panel nonetheless held that the sentence should be affirmed because the district court's error was harmless because "[t]he total 90-month sentence was well within the guideline range." (Exit. A at 33.)

STATEMENT OF FACTS

In finding that the district court's error was harmless, the Panel did not directly address the district court's intent. In an earlier part of its opinion rejecting the Appellants argument that the district court also erred by not giving a reduction for acceptance of responsibility, the Panel did note:

> Although the district court declined to give Hembree the § 3E1.1 reduction, it did consider Hembree's acceptance when it imposed the ultimate sentence of 90 months. The 90 months reflected the minimal sentence of 12 months for failing to appear, and 78 months, reduced from the original 80 months on the perjury and conspiracy counts.

(Exh. A at 29.)

Indeed, the following colloquy with the Government at the sentencing hearing demonstrates that the district court intended to give the lowest total sentence it could without departing from the guidelines:

> THE COURT: Well, let me ask the question again. Without calling it a departure, can I impose a sentence below 78 months [in the conspiracy/perjury case]?

MR. CONSTANTAKOS: No, Judge, not without declaring it a departure.

THE COURT: And in [the failure to appear case], can I impose a sentence below 12 months consecutive without calling that a departure?

MR. CONSTANTAKOS: No, Judge. Again, the guidelines for that case, by and in and of itself, is 12 to 18 months.

THE COURT: Well, let me do it this way. I am going to take Mr. Hensel's suggestion and reduce the sentence in [the conspiracy/perjury case] to 78 months. Count Two remains at 60 months concurrent. [The failure to appear case] remains 12 months, consecutive. And the total sentence is 90 months.

(Sentencing Transcript at 71.)

ARGUMENT

I. BECAUSE THE DISTRICT COURT ERRED IN DETERMINING THE APPLICABLE SENTENCING RANGE AND SENTENCED APPELLANT TO THE LOWEST SENTENCE WITHIN THAT RANGE, THE ERROR FOUND BY THE PANEL IS NOT HARMLESS.

The Panel correctly found that the district court erred in applying the sentencing guidelines, but it created a conflict in the law of this circuit by finding that the error was harmless. Prior to the Panel's decision, the law in this circuit was that a sentence would be reversed based on an error in applying the guidelines, even if it fell within the correct guideline range, unless the district court made it clear on the record that it would have imposed the same

sentence. *See United States v. Pielago,* 135 F.3d 703, 713-14 (11th Cir. 1998) (reversing 140-month sentence where district court erred in determining criminal history points, even though correct guideline range was 121 to 151 months); *id.* at 714 (Kravitch, S.J., concurring in relevant part) ("Because the district court did not clearly state that it would have imposed the 140-month sentence even if the sentencing range were 121 to 151 months, we must remand the case for resentencing."); *see also United States v. Saunders*, 318 F.3d 1257, 1262 n.2 (11th Cir. 2003) ("Because the court here did not explicitly state that it would have sentenced Sharon to eighteen months regardless of the outcome of the enhancement dispute, we review the merits of her appeal.")); *United States v. Fuente-Lokbenschlag*, 878 F.3d 1377, 1379 (11th Cir. 1989) ("We conclude, therefore, that a sentence is appealable if the appealing party alleges that the sentencing guidelines have been incorrectly applied, even in cases where the guideline ranges advocated by each of the parties overlap."); *cf. United States v. de la Torre*, 949 F.2d 1121, 1122 (11th Cir. 1992) ("We now join those circuits that find it unnecessary to resolve a dispute as to which guideline range is applicable when the lower court makes clear the same sentence would have been imposed irrespective of the outcome of the dispute.").

The Panel's opinion not only fails to address whether the district court made it clear that it would have imposed the same sentence had it accepted the Appellant's argument, but its opinion also recognizes that the district court imposed what it thought was the lowest possible sentence. (Exh. A at 29.) Indeed, the record affirmatively demonstrates that the district court sought to impose the lowest sentence it could without departing below the guideline

range. (Sentencing Transcript at 71.) Because the Panel's opinion conflicts with the *Pielago* line of cases, rehearing is required to maintain uniformity of decision in this circuit.

II. THE APPELLANT SHOULD HAVE BEEN ALLOWED TO RAISE A CONSTITUTIONAL CHALLENGE TO THE FEDERAL SENTENCING GUIDELINES BASED ON *BLAKELY V. WASHINGTON* BECAUSE HE PROMPTLY SOUGHT LEAVE TO SUPPLEMENT HIS INITIAL BRIEF AFTER *BLAKELY* WAS DECIDED AND HIS CASE HAD NOT YET BEEN SUBMITTED TO THE PANEL.

In *Blakely v. Washington,* the Supreme Court struck down, as violating the Sixth and Fourteenth Amendments, a state sentencing system that allowed a judge to resolve factual disputes that enhance a defendant's sentence. 124 S. Ct. at 2538. In her dissent, Justice O'Connor warned of the "far reaching" consequences of the Court's decision and reasoned: "Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, *as has the Federal Government." Id.* at 2549 (O'Connor, J., 3., dissenting) (emphasis added). The question of whether *Blakely* applies to the federal sentencing guidelines issues is pending on the merits in the Supreme Court. *United States v. Booker*, 125 S. Ct. 11 (2004); *Fanfan v. United States,* 125 S. Ct. 12 (2004).

Although the issue does not appear to have been briefed or argued in *Booker/Fanfan,* Justice O'Connor warned in *Blakely,* "Every sentence imposed under such guidelines [including the federal guidelines] in cases *currently pending on direct appeal* is in jeopardy." *Blakely*,

124 S. Ct. at 2549 (O'Connor, J., dissenting) (emphasis added). Indeed, the Supreme Court's holding in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), compels the conclusion that, if *Blakely* applies to the federal guidelines, then it will apply to all cases on direct appeal at the time *Blakely* was decided (and arguably at the time that *Booker/Fanfan* is ultimately decided).[3] Thus, the question presented is whether an appellant in such an appeal may raise a *Blakely* argument for the first time after filing his initial brief.

Earlier this month, this Court denied rehearing en banc with regard to the closely related question of whether a defendant can raise *Blakely* for the first time after this Court affirmed his sentence. *United States v. Levy*, ___ F.3d ___, 2004 WL 2755633, *1 (11th Cir. Dec. 3, 2004) (Hull, J. concurring). Judges Tjoflat, Barkett, and Wilson wrote or joined dissenting opinions from the denial of rehearing en banc in that case. The concurring and dissenting opinions in *Levy* suggest that all members of the Court have recently and thoroughly considered this issue, so re-argument at this point is unlikely to be helpful other than to highlight a few points.

For example, experience appellate attorneys in this circuit have endeavored to follow Judge Godbold's counsel that "the best advocacy relies on selectivity." *United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998), *quoted in Levy*, 2004 WL 2755633 at *15-17 (Tjoflat, dissenting). Unless

---

[3] All seven judges to write or sign on to an opinion in *United States v. Levy*, discussed *infra*, appeared to recognize that *Griffin* will require application of *Blakely/Booker/Fanfan* to cases pending on direct appeal. The issue that they disagreed with was whether the failure to raise the issue in the initial brief constitutes a "waiver" for purposes of *Griffin*.

rehearing en banc is granted, all appellate lawyers in Florida, Georgia, and Alabama[4] will be forced to rethink this advice and may reluctantly inundate the Court with "kitchen sink" briefs *Levy,* 2004 WL 2755633 at *17-18 (Tjoflat, dissenting); *id.* at *26 (Barkett, J., dissenting); *see also Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997) (holding that determination of whether an unpreserved error was "plain" is to be viewed at time appeal is decided, not when district court committed the error to avoid encouraging "counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent").

Moreover, in light of this Court's holding in *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001), that the federal guidelines do not violate the Sixth Amendment, the undersigned attorneys did not advise the Appellant that he had a right to challenge the constitutionality of the sentencing guidelines either in the district court or in the initial brief. Thus, in no sense can the failure to include this argument in the initial brief be deemed the "intentional relinquishment or abandonment of a known right," sufficient to constitute a "waiver." *See United States v. Olano*, 507 U.S. 725, 733-34, 113 S. Ct. 1770, 1777 (1993) (adopting this definition in explaining when a legal issue is "waived" to the point that it cannot be considered under plain error standard) (quoting *Johnson v. Zerbst*, 304 U.S.

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[4] The Eleventh Circuit is the only circuit in the nation to deny defendants the right to at least raise a *Blakely* argument under the plain error standard when they did not raise it in an initial brief filed before *Blakely* was decided. *Levy*, 2004 WL 2755633 at *15-17 (Tjoflat, dissenting).

458, 464, 58 S. Ct. 1019, 1023 (1938)), *quoted in Levy*, 2004 WL 2755633 at *15 (Tjoflat, J., dissenting).

That this Court denied rehearing en bane in *Levy* does not mean that it should do so again in this case. The main distinction between *Levy* and this case is that the Appellant here sought to raise *Blakely* before he lost his appeal. It is one thing to deny an appellant a second bite at the apple after the Court has expended its time and energy considering and deciding a case, but it is entirely another to deprive an appellant of a core constitutional right because his appellate lawyer submitted his brief before *Blakely* was decided. The (un)fortuity of Appellant having filed his initial brief three months too early may otherwise unfairly result in him remaining in federal prison away from his family for a number of years longer than the law would otherwise allow. A clear line of demarcation may indeed be necessary, but even if one accepts the rule in *Levy*,[5] that line should be when the case is decided or, at the absolute earliest, when the case is submitted to the panel after briefing has been completed.

[5] With all due respect to the judges joining the concurring opinion in *Levy*, the bright line should be the one identified by the Supreme Court in *Griffin* – the time that the direct appeal becomes final.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc and, ultimately, vacate the Appellant's sentence and remand for resentencing.

Respectfully submitted,

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Attorneys for Appellant Gregory Wade Hembree

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. mail to **Curtis Dunn, Esq.**, and **Randall Joseph Hensel, Esq.**, Assistant United States Attorneys, 21 East Garden Street, Suite 400, Pensacola, Florida 32501 this ___ day of December, 2004.

/s/ John S. Mills
Attorney

APPENDIX J

[Names And Phone Numbers Omitted In Printing]

January 19, 2005

Hon. Thomas K. Kahn, Clerk
Clerk's Office
United States Court of Appeals, Eleventh Circuit
56 Forsyth Street NW
Atlanta, GA 30303

Re: *United States v. Hembree*, Case No. 03-16001-H

Dear Mr. Kahn:

This letter is submitted on behalf of Appellant Gregory Hembree pursuant to 11th Circuit Rule 40-5 to advise the Court of the Supreme Court of the United States' opinion in *United States v. Booker,* 543 U.S. ___, ___ S. Ct. ___ (Jan. 12, 2004), a copy of which is enclosed. Please note that this matter is pending on a petition for rehearing en banc so copies of this letter should be sent to all active judges.

In *Booker,* the Court holds that the United States Sentencing Guidelines are unconstitutional, as urged in Appellant's Petition for Rehearing En Banc. As noted in the petition, the district court made clear that it intended to give the lowest possible sentence. Moreover, it enhanced Appellant's sentence based on the court's (as opposed to the jury's) finding of obstruction of justice. Thus, his sentence was plainly unconstitutional and violated his substantial rights. As Justice Breyer's opinion for the Court (the second part of the opinion of the Court) makes clear, *Booker* applies to all cases pending on direct appeal. Slip Op. at 25. Given this express directive from the nation's highest Court, the Appellant is entitled to resentencing as requested in the petition.

Very truly yours,

/s/ John Mills
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cc: William M. Kent, Esq.
Cutis Dunn. Esq.
Randall Joseph Hensel, Esq.

APPENDIX K

[Names And Phone Numbers Omitted In Printing]

February 3, 2005

Hon. Thomas K. Kahn, Clerk
Clerk's Office
United States Court of Appeals, Eleventh Circuit
56 Forsyth Street NW
Atlanta, GA 30303

Re: *United States v. Hembree*, Case No. 03-16001-H

Dear Mr. Kahn:

This letter is submitted on behalf of Appellant Gregory Hembree pursuant to 11th Circuit Rule 40-5 to advise the Court of the Sixth Circuit's opinion in *United States v. Oliver,* ___ F.3d ___,Case No. 03-2126 (Feb. 2, 2005), a copy of which is enclosed, Please note that this matter is pending on a petition for rehearing en banc so copies of this letter should be sent to all active judges.

In *Oliver,* as in the instant case, the defendant did not challenge the constitutionality of the Federal Sentencing Guidelines in his initial brief, which was filed prior to *Blakely* and *Booker.* However, as did the Appellant in this case, the Defendant raised this argument for the first time after his initial brief through supplemental briefing. The Sixth Circuit held that this was sufficient to raise the claim on appeal:

> Oliver's brief did not initially raise the claim that his sentence violated the Sixth Amendment as the brief was submitted prior to the Supreme Court's ruling in either *Blakely v. Washington,* 124 S. Ct. 2531 (2004), or *United States v. Booker,* 543 U.S. ___, Nos. 04-104 and 04-105, 2005 WL 50108 (Jan. 12, 2005). Prior to our oral argument,

> the Supreme Court announced its decision in *Blakely*. In response, on July 21, 2004, Oliver submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) advising us that *Blakely* constituted a supplemental authority pertaining to Oliver's sentencing challenge. At oral argument, Oliver's appellate counsel again asserted that Oliver's sentence violated the Sixth Amendment under *Blakely*. Oliver also submitted a second Rule 28(j) letter following the Supreme Court's decision in *Booker*, arguing that based on that decision his case should be remanded for re-sentencing.
>
> We conclude that the steps taken by Oliver both before and after oral argument were sufficient to raise on appeal the issue of the constitutionality of Oliver's sentence. Both letters submitted by Oliver complied with requirements of Rule 28(j) and, along with counsel's statement at oral arguments, provided us with notice of the challenged issue. We agree with the First Circuit's determination in *United States v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) that: "Since Appellant's argument depends upon a decision that did not exist at the time of briefing, a 28(j) letter is a perfectly appropriate avenue by which to present it." *Id.* at 59 (accepting a Rule 28(j) letter making an argument based on *Blakely* that could not have been made when the briefs were submitted).

Id. at 5 n.1.

The Sixth Circuit also held in *Oliver* that the district court's application of the same sentencing guideline enhancement imposed in this case amounted to plain error

in light of *Booker*, requiring a remand for a new sentencing. *Id.* at 6-8.

The same result should obtain in this case.

Very truly yours,

/s/ John Mills
John S. Mills
jmills@appellate-firm.com

cc: William M. Kent, Esq.
Cutis Dunn, Esq.
Randall Joseph Hensel, Esq.

(7)

MAY 11 2005

No. 04-1210

In the Supreme Court of the United States

GREGORY WADE HEMBREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General
Counsel of Record

JOHN C. RICHTER
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Department of Justice
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QUESTION PRESENTED

Whether the Eleventh Circuit abused its discretion by applying an established procedural default rule to decline to consider a claim of error under *United States* v. *Booker*, 125 S. Ct. 738 (2005), where petitioner failed to raise the claim in his opening brief.

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In the Supreme Court of the United States

No. 04-1210

GREGORY WADE HEMBREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence (Pet. App. 1a-31a) is unreported, but the judgment is noted at 125 Fed. Appx. 981 (Table). The order denying petitioner's motion to file a supplemental brief (Pet. App. 44a) is unreported. The order denying petitioner's motion to file a substitute principal brief or for reconsideration of the denial of his motion to file a supplemental brief (Pet. App. 45a-46a) is reported at 381 F.3d 1109.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2004. A petition for rehearing was denied on February 7, 2005. Pet. App. 47a. The petition for a writ of

certiorari was filed on March 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was convicted, following a jury trial, of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); and perjury, in violation of 18 U.S.C. 1623. Petitioner was also convicted, following a guilty plea, of failure to appear, in violation of 18 U.S.C. 3146(a)(1), (b)(1)(A)(i) and (ii). Pet. App. 32a-33a. Pursuant to the Sentencing Guidelines, the district court imposed concurrent sentences of 60 months of imprisonment for the perjury conviction and 78 months of imprisonment for the drug conviction, and a consecutive sentence of 12 months for the failure-to-appear conviction. *Id.* at 34a.

2. In his opening brief on appeal, petitioner raised several claims of plain error with respect to his conviction, including challenges to the district court's evidentiary rulings, jury instructions, and its decision to join the conspiracy and perjury counts. Pet. App. 2a. Petitioner also argued that, at sentencing, the district court failed to credit him properly for acceptance of responsibility in the failure-to-appear case and misapplied a Sentencing Guidelines provision. *Id.* at 25a. Petitioner did not challenge the constitutionality of using judicially found facts at sentencing.

After petitioner's principal brief was filed, this Court issued its decision in *Blakely* v. *Washington*, 125 S. Ct. 2531 (2004). Petitioner then filed a motion for leave to file a supplemental brief seeking to raise, for the first time in any court, a claim that the district court's application of the Guidelines violated the Sixth Amendment. Pet. 4 n.2. The court of appeals denied petitioner's motion, citing circuit precedent establishing that a party may not raise a claim

for the first time in a supplemental brief. See Pet. App. 44a (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)). Petitioner then filed a motion to file a substitute principal brief or in the alternative for reconsideration of the denial of his motion to file a supplemental brief. The court denied the motion, Pet. App. 45a-46a, noting that permitting the filing of substituted or amended principal briefs would permit circumvention of the general rule that "a party may not raise through a supplemental brief an issue not previously raised in his principal brief." *Id.* at 46a.

The court affirmed petitioner's conviction and sentence. Pet. App. 1a-31a. The opinion discussed only the arguments raised in petitioner's principal brief, and did not discuss *Blakely*.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit addressed the application to *Booker* claims of its rule that issues not raised in a party's opening brief will be deemed abandoned. There, the court of appeals held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth

Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at 1262-1263. The court stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord *United States* v. *Senn*, No. 02-16983, 2005 WL 1006885, at *1 (11th Cir. Apr. 29, 2005) (per curiam) (following *Dockery*, on remand for reconsideration in light of *Booker*).

ARGUMENT

Petitioner contends (Pet. 7-11) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Petitioner also contends (Pet. 7-21) that the Eleventh Circuit's rule is an "absolute bar" (Pet. 5; see also Pet. 6) to consideration of issues not raised in a defendant's opening brief that conflicts with decisions of "[e]very other circuit." Pet. 15. Neither contention has merit. Further review is not warranted.[1]

[1] Because the court of appeals confirmed in *United States* v. *Dockery*, 401 F.3d 1261 (11th Cir. 2005) (per curiam), and *United States* v. *Senn*, No. 02-16983, 2005 WL 1006885, at *1 (11th Cir. Apr. 29, 2005) (per curiam), that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, it is unnecessary for this Court to remand this case for

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court (as petitioner concedes, see Pet. 11) did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See 479 U.S. at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely

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reconsideration in light of *Booker*.

> raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir.) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that, while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved. *Ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims

were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 105 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[2] This Court has never suggested the contrary.[3]

b. Petitioner errs in contending (Pet. 5) that the Eleventh Circuit's procedural bar rule "is an absolute bar" to consideration of issues that were not raised in a defendant's opening brief. See also Pet. 15 (contending that "the Eleventh Circuit made clear * * * that its rule against raising a new issue * * * was absolute"). The court of appeals has, however, addressed claims of *Booker* error although

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[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

[3] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir.), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address an issue on the merits where manifest injustice would otherwise result.[4]

2. Petitioner contends (Pet. 7-21) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of the other courts of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential

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[4] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005).

rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[5] The courts of appeals have recognized that that rule is not jurisdictional or absolute and

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[5] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (citations and internal quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir.) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Ft. Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 799 (Fed. Cir. 1990) ("an issue not raised by an appellant in its opening brief * * * is waived").

therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir.) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see p. 8, *supra*, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its long-standing rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 401 F.3d at 1262-1263; *Levy*, 379 F.3d at 1243 n.3 ("[W]e conclude that 'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal.") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc)); see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts that "all of the circuits have ruled on the question presented," Pet. 21, and "[e]very other circuit" permits defendants "to raise a new issue based on an inter-

vening Supreme Court decision, even if the issue was not raised in the initial brief." Pet. 15. In the vast majority of the cases petitioner cites, however, the courts did not explicitly consider application of the rule that courts will not entertain issues not raised in an opening brief, and there is no indication the government urged the court to hold the claims to be defaulted.[6] Thus, it appears that most courts that have addressed claims in this posture have not explic-

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[6] Of the thirty-four cases petitioner cites to support his contention that "all of the circuits have ruled on the question," only one discusses whether to apply the ordinary rule that issues not raised in an opening brief will not be considered; even that case did so only in passing in a footnote, without the benefit of briefing or argument by the parties. See *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); see also note 3, *supra*. Four other cases state in passing that it was appropriate to consider the claims in that posture because this Court had recently clarified the law, without explicitly discussing the rule that claims must be raised in a party's opening brief. See *United States* v. *Hines*, 398 F.3d 713, 721 (6th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 376 n.1 (6th Cir. 2005), petition for reh'g pending (filed Mar. 15, 2005); *United States* v. *Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004), subsequent determination, 402 F.3d 748 (7th Cir. 2005); *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 69 (1st Cir. 2004).

The United States is aware of only three decisions besides *Washington* (none of which petitioner cited, and one of which is nearly 20 years old) that have entertained claims raised in supplemental briefing in light of intervening decisions of this Court that have explicitly considered whether to apply the ordinary prudential rule against considering issues not raised in the opening brief. See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). In two of those cases, the courts may have exercised discretion to proceed to the merits of the argument the defendant had raised only because the court concluded it clearly lacked merit. See *Miranda*, 248 F.3d at 446; *Byers*, 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits").

itly declined to apply the procedural bar rule, and thus those decisions cannot be said to "conflict" with the decision below. Petitioner is therefore incorrect that (Pet. 23) the law in the courts of appeals "is as developed as it is likely to get" and that the positions of the courts of appeals on this issue "are all set in stone." *Ibid.*

b. Even if other courts of appeals *had* explicitly declined to apply the usual procedural bar rule to claims based on intervening decisions of this Court in *Booker* and *Blakely*, further review would not be warranted. Rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). This Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this

Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 14-15) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *Levy*, 391 F.3d at 1332 (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."); *id.* at 1333 (noting that even before *Blakely*, "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

GREGORY WADE HEMBREE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

1. The Government opens its argument by defending the merits of the court of appeals' decision on the question presented. Opp. 5-8. While the merits are more properly addressed in full in a merits brief, the Petitioner briefly responds to the Government's two substantive points.

a. First, the Government contends that the court of appeals' decision to foreclose arguments based on cases decided after the initial brief was filed does not violate this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987). In *Griffith*, the Court held that it would be antithetical to the notion of due process and judicial review to not apply an intervening decision retroactively to all cases still pending on direct appeal because the defendant in the intervening case was "similarly situated" to other defendants with appeals pending at the time. *Id.* at 322-23. The Government contends that this principle is consonant with the court of appeals' holding because "[d]efendants who have not preserved a claim of error are not 'similarly situated' to those who have." Opp. 5.

This argument flies in the face of the long-held jurisprudential principles underlying the availability of plain-error review of unpreserved arguments. Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993). Plain-error review is available because a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice." *Ibid.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

The court of appeals, however, has adopted precisely this kind of "rigid and undeviating judicially declared practice" and has declined in every instance to even consider whether the particular defendant has been denied "fundamental justice" as a result. Indeed, in this very case, the Government does not dispute the Petitioner's assertion in his petition that under the record in this case, he would receive a lower sentence even under the Eleventh Circuit's stringent *Booker* plain-error case law, if only the court of appeals would entertain his argument. Pet. 23-24; *see also* Supreme Court Rule 15.2 (advising that the respondent has an obligation to raise "any perceived misstatement of fact or law" in its brief in opposition). Particularly in light of the fact that binding circuit precedent directly foreclosed a Sixth Amendment challenge to the sentencing guidelines before *Blakely*, Pet. 14 n.6, any rule of law that penalizes the Petitioner so harshly would be manifestly unjust.

The Government also seizes on Judge Edward Carnes' defense of the court of appeals' unique absolute bar:

> It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

Opp. 6 (quoting *United States v. Ardley*, 273 F.3d 991, 992 (11th Cir.) (Carnes, J., concurring in denial of rehearing en

banc), *cert. denied*, 533 U.S. 962 (2001), *and* 535 U.S. 979 (2002)). The Government and Judge Carnes overlook the fact that the express policy, as explained in *Griffith*, in the former situation is to defeat a procedural bar,[1] while in the latter situations, the policies are purely substantive. In other words, refusing to apply a defaulted substantive rule of law is not nearly as troubling as refusing to apply a defaulted rule of law that's very purpose is to avoid defaults based on fortuity. In short, the Government provides no sufficient justification for the court of appeals' harsh and near absolute prohibition on raising hither-to foreclosed arguments based on an intervening Supreme Court decision.

b. The Government next argues that the court of appeals' rule is not so harsh or absolute because on one occasion the court found an exception where the Government had confessed error. Opp. 7-8 (citing *United States v. Dacus*, No. 04-15319, 2005 WL 1017985 (11th Cir. May 3, 2005)). That the court of appeals has chosen to abdicate its judicial discretion to prevent manifest injustice to the unilateral whim of the prosecution only raises additional, separation-of-powers problems. It in no way provides support in logic or policy to the court of appeals' harsh rule. Again, the court of appeals has not given any explicit consideration to the actual effect of its procedural bar; so any suggestion that the court is exercising informed discretion has no support.

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[1] The specific procedural bar in the *Griffith* context is the general principle that the question of whether a trial court erred must be made in light of the law governing at the time the trial court made its decision.

2. The Government's arguments in the remainder of its brief in opposition that certiorari review is not appropriate are equally unavailing.

a. First, the Government suggests that there is not a defined circuit split and that all circuits apply the general rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." Opp. 9. While even the Petitioner agrees that this is the universal general rule, the Government points to no other circuit that has applied this rule of "waiver"[2] to the context of an intervening Supreme Court decision. To the contrary, as demonstrated in the Petition, every other circuit does consider arguments not raised in the initial brief when they are based on intervening decisions. Pet. 15-21.

While the Government is certainly correct that few other circuits have taken the time to fully explain why they allowed supplemental briefing, the most likely explanation is that the Eleventh Circuit's rule is so harsh and so offends notions of fair judicial review that other courts have not even perceived this as a legitimate issue. After all, this Court has expressly directed the courts of appeals to apply *Booker* to "all cases pending on direct review." While the Court made clear that prudential doctrines, such as plain error review, might result in many cases being affirmed despite *Booker* error, nowhere did the Court suggest that the courts of appeals had the authority

[2] That is, the court of appeals posits an appellant can be viewed to have "waived" the right to bring an argument that he not only did not know he had, but that binding precedent clearly foreclosed. To state the principle is to refute it.

to apply a "prudential doctrine" to refuse to even consider the application of *Booker* at all.

Indeed, since the Petition was filed, the other circuits have continued to entertain post-initial-brief challenges based on *Booker*. *United States. v. Vazquez-Rivera*, ___ F.3d ___, 2005 WL 1163672, *8 (1st Cir. 2005) (expressly addressing and rejecting Government's opposition to defendant raising issue for first time after initial brief); *see also United States v. Collins*, Case No. 03-5096, 2005 WL 910731, *1 (6th Cir. Apr. 20, 2005) (considering *Booker* argument raised for first time in supplemental briefing); *United States v. Cacho-Bonilla*, 404 F.3d 84, 94 (1st Cir. 2005) ("Although the defendants did not raise the issue . . . in their initial brief, we invited them to make the plain-error showing [under *Booker*]."); *United States v. Dazey*, 403 F.3d 1147, 1179 (10th Cir. 2005) ("Mr. Dazey's sentence is AFFIRMED as to all arguments raised in his initial brief, but is VACATED in light of *Booker*."); *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005) (considering *Booker* argument raised for the first time in supplemental brief).

Even accepting the Government's suggestion that a true circuit split only exists with regard to decisions that expressly discuss the rule against raising new issues after the initial brief, Opp. 11 n.6, the split is 5-1, with the First, Fourth, Fifth, Seventh, and D.C. Circuits firmly in conflict with the Eleventh. *See Vazquez-Rivera*, ___ F.3d ___, 2005 WL 1163672 at *8 (1st Cir.); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); *United States v.*

Garcia, 242 F.3d 593, 599 & n.5 (5th Cir. 2001); *United States v. Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004);[3] *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984).

At any rate, the Government's suggestion that the courts of appeals need more time to address and develop this issue ignores reality. While the rule affects the literally thousands of "pipeline" defendants who had briefed their appeal before *Blakely*, the time for resolving the issue and providing the same level of justice throughout the nation is fleeting.

b. Finally, the Government notes that this Court has recognized that it is acceptable for the courts of appeals not to strictly adhere to a uniform set of rules regarding procedural matters. Opp. 12-13. The Petitioner does not quarrel with this general proposition. Indeed, so long as the procedural rules are clear from the outset, no serious injustice will typically arise by one circuit following one procedure and another following a different procedure. In this case, however, the relevant procedural rule specifically requires a party to raise an issue that the court has previously rejected outright. In other words, it requires parties and their counsel to know the unknowable and predict the unpredictable. No system of justice should require lawyers and their clients to predict when the Supreme Court might overrule long-standing circuit precedent.

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[3] The Petitioner disputes the Government's suggestion that *Henningsen* does not fully discuss this issue. Opp. 11 n.6.

Regardless of the ultimate merits of the court of appeals' rule, it is clear that it has a very dramatic and substantive impact and that it has been expressly or implicitly rejected by every other court of appeals. This Court should resolve the split.

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No. 04-1210

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In The Supreme Court of the United States

GREGORY WADE HEMBREE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

This case is pending on the Petitioner's Petition for Rehearing of the Court's order summarily granting a writ of certiorari, vacating, and remanding for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005). The Petitioner submits this supplemental brief pursuant to Rule 15.8 to address three decisions that have been handed down since the petition for rehearing was filed: (1) the Eleventh Circuit's decision in *United States v. Levy*, Case No. 01-17133 (11th Cir. July 12, 2005),[1] which is reprinted in the appendix hereto, (2) the Eleventh Circuit's decision in *United States v. Vanorden*, Case No. 02-14049 (11th Cir. June 30, 2005), which is also reprinted in the appendix, and (3) this Court's decision on June 20, 2005, to deny a petition for writ of certiorari in *Rodriguez v. United States*, Case No. 04-1148. The purpose of this brief is to demonstrate (1) that the Court's remedy in this case will not have its intended effect, (2) that the Court should order the court of appeals to apply the holding in *Booker* to Petitioner's case, and (3) that the question presented in this case is not limited to *Booker* and does not require any further clarification of *Booker*.

I. The Eleventh Circuit Will Not Give Meaningful Effect to this Court's Remand Order.

In his pending Petition for Rehearing, the Petitioner expressed his understanding that the Court intended for the Eleventh Circuit to apply this Court's decision in

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[1] This brief refers to the court of appeals' July 12, 2005, decision as "*Levy*." Other opinions in that case are referred to by their complete citation.

Booker to determine whether the Petitioner could demonstrate plain error in his sentence, but asked this Court to reconsider its summary remand order because he "is concerned that the Eleventh Circuit will not share this interpretation of the Court's order." (Petition for Rehearing at 1-2.) The Eleventh Circuit's subsequent decisions in *Levy* and *Vanorden* confirm the Petitioner's concerns.

Levy involves the same issue raised in the question presented by the Petitioner here – whether a court of appeals may refuse to apply an otherwise retroactive decision of this court in a case that was pending on direct appeal at the time of this Court's decision where the appellant did not have the foresight to raise the issue in an initial brief filed before that decision. Both *Levy* and this case address this question in the context of *Booker*.

As was this case, *Levy* was pending on direct appeal when this Court issued its opinion in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), the direct antecedent to *Booker*. (App., *infra*, 2a.) Like the Petitioner in this case, the defendant in *Levy* did not raise a constitutional challenge to the Federal Sentencing Guidelines in his initial brief to the court of appeals. (App., *infra*, 2a-3a.) Indeed, binding Eleventh Circuit precedent clearly foreclosed any such argument. *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001). As did the Petitioner, the *Levy* defendant sought to raise the issue for the first time after *Blakely* was decided and after he had filed his initial brief, but while his case was still pending on direct appeal.[2] (App., *infra*, 2a.)

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[2] The defendant in *Levy* sought to raise *Blakely* in a petition for rehearing after his sentence was affirmed (App., *infra*, 2a), while the

(Continued on following page)

The court of appeals refused to entertain the *Blakely* argument because it had not been raised in the initial brief. *United States v. Levy*, 379 F.3d 1241, 1242-45 (11th Cir. 2004). The court subsequently denied rehearing en banc. *United States v. Levy*, 391 F.3d 1327 (2004). The court's reasoning and result in that case were the same as in the case below; indeed, the court of appeals cited this earlier opinion in refusing to allow the Petitioner to raise a *Blakely/Booker* argument in this case. (Petition for Writ of Certiorari Appendix at 44a.)

The *Levy* defendant then filed a petition for a writ of certiorari raising the same issue raised by Petitioner. Case No. 04-8942. On June 6, 2005, this Court granted the petition, vacated the court of appeals' decision, and remanded for further consideration in light of *Booker*. (App., *infra*, 3a.) The relevant language of this order was identical to the decision in this case.

On July 12, 2005, the court of appeals issued an opinion explaining that it has "now considered Levy's case in light of *Booker*," but affirmed for the same reasons as before and re-instated its prior opinion. (App., *infra*, 2a, 14a.) The last section of its opinion makes clear that the court of appeals was announcing how it would treat all *Booker* remands, such as the remand in this case. (App., *infra*, 12a-13a.) That section is titled "The Affect [sic] of Supreme Court Remands on the Application of This Court's Prudential Rules" and begins as follows:

> Since *Booker*, the Supreme Court has remanded over a hundred of our Circuit's cases with this

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Petitioner in this case sought leave to raise it in a supplemental brief prior to a decision.

> standard order or something similar: "The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of [*Booker*]." . . . Obviously, some of these remands, including *Levy*, involved cases in which this Court applied its prudential rules and refused to consider defendant's [sic] belated efforts to raise *Blakely/Booker* claims.

(App., *infra*, 12a.)

The court of appeals then explained its view that these remand orders require no more than that where the claim was not raised in the initial brief, the court of appeals must state that it has looked at the case and decided again to apply its "prudential rule" to refuse to consider the merits of the *Booker* claim. The court of appeals will, as a matter of course, simply reinstate its prior opinion and affirm the sentence without applying the holding in *Booker*. (App., *infra*, 13a.) The court of appeals noted that this Court's summary remand orders do "not necessarily impinge on [the court of appeals'] application of its prudential rules" and, instead, are merely "boilerplate orders [that] come out in bushel baskets full." (App., *infra*, 13a (quoting *United States v. Ardley*, 273 F.3d 991, 994 (11th Cir. 2001) (Carnes, J., concurring in the denial of rehearing en banc)).)

Vanorden followed essentially the same fact pattern, and the court of appeals again re-instated its prior opinion without applying the holding of *Booker*. (App., *infra*, 17a-18a.) Judge Tjoflat authored an opinion concurring in the result because he believed that this result was required under the Eleventh Circuit's decision in *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), which is discussed

in the petition for rehearing. (App., *infra*, 18a.) Judge Tjoflat described the *Dockery* rule as "a strange rule" and a "very bad rule." (App., *infra*, 18a.) He concluded:

> The upshot of our rule . . . is that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review will not apply at all to cases on direct review like this one [where the issue was not raised in the appellant's initial brief].

(App., *infra*, 27a-28a (citations omitted).)

Thus, the "writing is on the wall." This Court's remand order will not grant any meaningful relief to the Petitioner. Unless rehearing is granted, the Eleventh Circuit will simply rubber stamp a re-instatement, and the Petitioner will have to file a second petition for a writ of certiorari, incurring additional expense, requiring additional judicial labor, and further delaying a final disposition in this case. As noted in the petition for rehearing, moreover, if the Petitioner ultimately prevails on the merits, then he will likely be entitled to immediate release from prison.

II. This Court Should Order the Court of Appeals to Apply the Holding in *Booker* to the Petitioner's Case.

The Petitioner has thoroughly briefed why the Eleventh Circuit's "prudential rule," which conflicts with the rules of all of the other courts of appeals, should be rejected by this Court. In *Levy*, the court of appeals raised a new argument in favor of its rule. Specifically, the court of appeals suggested that this Court has applied this same prudential rule in *Pasquantino v. United States*, 543 U.S.

___, 125 S. Ct. 1766 (2005). (App., *infra*, 7a-8a.) In that case, the petitioner sought to raise a *Booker* argument for the first time in his brief on the merits, even though he did not raise it in his petition for a writ of certiorari or in the court of appeals. *Id.* at ___ n.14, 125 S. Ct. at 1781 n.14. The majority declined to consider the argument in light of the Court's rule that arguments not raised below or in the petition generally are not considered on the merits. *Id.*; *but see id.* at ___ n.5, 125 S. Ct. at 1783 n.5 (Ginsburg, J., dissenting) (arguing that Court should have made an exception to this prudential rule).

The court of appeals concluded, "It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim." (App., *infra*, 8a.) This conclusion is far from "obvious," however, because a court of appeals has a very different role and very different responsibilities than does this Court. In cases reviewed by petition for a writ of certiorari, this Court's jurisdiction is entirely discretionary and is generally exercised based on principles of clarifying important rules of law and resolving conflicts among the lower courts. The courts of appeals, on the other hand, have mandatory jurisdiction and are error-correcting courts.

Moreover, this Court has long rejected the notion that a court of appeals may apply a "prudential rule" to outright refuse to consider an issue that was not raised in the lower court. *See generally United States v. Olano*, 507 U.S. 725 (1993) (courts of appeals must consider merits of issues raised for the first time on appeal, albeit under less stringent plain error standard). There can be no doubt in

this case (and the Government did not dispute in its brief in opposition) that the Petitioner can satisfy the plain error test.

Finally, Judge Tjoflat sets forth additional compelling arguments to reject the Eleventh Circuit's rule, a rule that he describes as "particularly problematic when applied to cases on remand from the Supreme Court." (App., *infra*, 28a.) Indeed, Judge Tjoflat expressly urged this Court to correct this erroneous rule. (App., *infra*, 23a, 28a.)

First, he reiterated that the Eleventh Circuit's rule is not an "ordinary prudential doctrine" and is certainly not a form of "waiver" because the defendants in these cases had no "known right" under *Blakely* at the time they filed their initial briefs, particularly in light of the fact that the Eleventh Circuit had conclusively held that they had no such right. (App., *infra*, 21a-23a.)

Second, he argued that this Court's use of a summary "GVR" order (i.e., an order like the one in this case that summarily grants a writ of certiorari, vacates the court of appeals' decision, and remands for further consideration), though "always ... something of a mystery," requires application of the *Booker* holding in these cases. (App., *infra*, 23a-27a.) He relied in part on the following policies this Court outlined in *Stutson v. United States*, 516 U.S. 193 (1996), regarding GVR orders in criminal cases:

> When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that

> caused no prejudice to the prosecution to preclude a remand . . . "in the interests of justice." And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. . . .
>
> Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience." "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts."

(App., *infra*, 25a (quoting *Stutson*, 516 U.S. at 196-97 (in turn quoting *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981), and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942))).)

Judge Tjoflat rightly concluded that the Eleventh Circuit's rule is not only inconsistent with these policies, but also violates this Court's retroactivity jurisprudence in *Teague v. Lane*, 489 U.S. 288, 310 (1989), and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987):

> The Supreme Court has consistently identified the end of a defendant's direct appeal as the point at which systemic interests in finality surpass the defendant's interest in benefiting from a new rule of constitutional law. By refusing to consider claims such as Vanorden's, we [i.e., the Eleventh Circuit] have said essentially that the Supreme Court struck the wrong balance and that the defendant's opening brief on appeal should be the tipping point. Because our reevaluation is based on nothing more than "convenience" and "dry formalism," it is inconsistent with the important and "familiar aspect[s]" of "our legal traditions" *Stutson* emphasizes.

(App., *infra*, 25a-26a.) Further, Judge Tjoflat noted that by refusing to consider *Booker* issues not raised in the initial brief, the Eleventh Circuit is thwarting another purpose this Court identified in *Stutson* – "to consider . . . arguments that were not previously before [the court of appeals]." (App., *infra*, 27a (quoting *Stutson*, 516 U.S. at 197).)

Thus, this Court should take this opportunity to vindicate the policies it has espoused and reject the Eleventh Circuit's unflinching refusal to apply *Booker* in cases such as this.

III. The Question Presented in This Case Is Not Limited to *Booker* and Does Not Require Any Further Clarification of *Booker*.

The Court recently denied a petition for a writ of certiorari in *Rodriguez v. United States*, Case No. 04-1148 (June 20, 2005), in which both the petitioner and the Solicitor General asked the Court to resolve a substantial split among the circuits regarding how the plain error standard should be applied to *Blakely/Booker* "pipeline cases" (i.e., cases that were pending on direct review at the time of *Blakely* or *Booker*). Commentators have inferred from this denial that the Court may not want to delve back into the issues raised by those recent decisions. *See, e.g.*, Lyle Denniston, *Court turns aside Booker sequel*, SCOTUSblog, *at* http://www.scotusblog.com/movabletype/archives/2005/06/court_returns_t.html (June 20, 2005) ("The Supreme Court [in *Rodriguez*] sent an emphatic signal that it is not yet ready to start sorting out some of the complications of its January 12 decision in *U.S. v. Booker*."); *see generally* Douglas A. Berman, *Pondering the SCOTUS plain error dodge*, Sentencing Law & Policy, *at*

http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/pondering_the_s.html (reviewing reasons the Court might feel that certiorari review is not appropriate at this time) (June 20, 2005).

Any hesitancy by the Court to address *Booker* issues at this time should not deter the Court from resolving the split raised by the Petitioner in this case. Although this case involves a *Booker* claim, the question presented does not require any application, refinement, or further interpretation by this Court of the Sixth Amendment, the Sentencing Guidelines, or the holdings in *Booker* and *Blakely*. Nor will this issue eventually go away when the *Blakely/Booker* pipeline dries up. The issue arises any time the Court announces a new rule of criminal procedure that is applicable to cases pending on direct appeal.

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July 14, 2005

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-17133

D.C. Docket No. 99-08125-CR-DTKH

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

RAPHAEL R. LEVY

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(July 12, 2005)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before ANDERSON, HULL and PRYOR, Circuit Judges.

PER CURIAM:

This case is before this Court for the third time. We previously affirmed Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and denied Levy's

petition for rehearing in *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004).[1] On June 6, 2005, the Supreme Court vacated our judgment and remanded Levy's case to us for further consideration in light of *United States v. Booker*, 125 S.Ct. 738 (2005). *See Levy v. United States*, ___ S.Ct. ___, 2005 WL 540692 (U.S. June 6, 2005).

Having now considered Levy's case in light of *Booker*, we affirm Levy's sentences not only for the reasons stated in our prior opinions but also for those explained below.

I. BACKGROUND

After this Court affirmed Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), the Supreme Court decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004), which extended the constitutional rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to the Washington State Sentencing Guidelines. As we all are aware, the Supreme Court again extended *Apprendi* to the United States Sentencing Guidelines in *Booker*.

After *Blakely*, but before *Booker*, Levy filed a petition for rehearing in this Court asserting, for the first time, that he had a right to a jury trial regarding his federal sentencing enhancements. In his petition for rehearing, Levy conceded that at no time prior to his petition for rehearing – not in the district court and not in his briefs on appeal – did he raise any argument regarding the constitutionality of the sentencing guidelines or any right

[1] On December 3, 2004, this Court also denied Levy's petition for en banc rehearing. *United States v. Levy*, 391 F.3d 1327 (2004).

to a jury trial on his sentencing enhancements or any arguments grounded in *Apprendi*.

On August 3, 2004, this Court denied Levy's petition for rehearing based on this Court's long-standing prudential rule of declining to entertain issues not raised in an appellant's initial brief on appeal but raised for the first time in a petition for rehearing. *See, e.g., Levy*, 379 F.3d at 1242-45; *United States v. Ardley*, 273 F.3d 991, 991-95 (11th Cir. 2001) (Carnes, J., concurring in the denial of rehearing *en banc*) (collecting cases); *United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000).[2]

Levy then filed a petition for *certiorari* in the Supreme Court. The Supreme Court granted *certiorari*, vacated our judgment, and remanded Levy's case for consideration in light of *Booker*, stating as follows:

> Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005).

Levy v. United States, ___ S.Ct. ___ 2005 WL 540692 (U.S. June 6, 2005). Before considering Levy's case in light of

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[2] Subsequently, this Court has applied this prudential rule in other cases where defendants untimely raised *Blakely*, now *Booker*, claims. *See, e.g., United States v. Pipkins*, ___ F.3d ___ 2005 WL 1421449, at *2 (11th Cir. June 20, 2005); *United States v. Sears*, ___ F.3d ___, 2005 WL 1334892, at *1 (11th Cir. June 8, 2005); *United States v. Verbitskaya*, 406 F.3d 1324, 1339-40 (11th Cir. 2005); *United States v. Day*, 405 F.3d 1293, 1294 n.1 (11th Cir. 2005); *United States v. Dockery*, 401 F.3d 1261, 1262-63 (11th Cir 2005).

Booker, we first explain our prudential rule that issues not raised in a party's initial brief are deemed abandoned and generally will not be considered by this Court. We then consider Levy's case in light of *Booker*, explain why under *Booker* our established prudential rule still applies, and thus why under *Booker* defendant Levy is not entitled to a new sentencing.

II. THIS COURT'S PRUDENTIAL RULE

In *Nealy*, this Court summarized our prudential rule of declining to consider issues not timely raised in a party's initial brief, as follows:

> Parties must submit all issues on appeal in their initial briefs. When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on "*intervening* decisions or *new* developments" regarding issues already properly raised in the initial briefs. Also, parties can seek permission of the court to file supplemental briefs on this new authority. But parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority.

Nealy, 232 F.3d at 830 (internal citations omitted). This Court's prudential rule is well established, and thus we repeatedly have declined to consider issues raised for the first time *in a petition for rehearing. See, e.g., United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996); *Scott v. Singletary*, 38 F.3d 1547, 1552 n.7 (11th Cir. 1994); *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481 (11th Cir. 1989); *Dunkins v. Thigpen*, 854 F.2d 394, 399 n.9 (11th

Cir. 1988); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir. 1985).[3]

To allow a new issue to be raised in a petition for rehearing circumvents Federal Rule of Appellate Procedure 28(a)(5), which requires that an appellant's initial brief must contain "a statement of the issues presented for review."[4] Further, the rule requiring that issues be raised

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[3] In addition, before a decision on the merits of a direct appeal, this Court repeatedly has denied motions to file supplemental briefs that seek to raise new issues not covered in an appellant's initial brief on appeal. *See, e.g., Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000); *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1495-97 (11th Cir. 1990) (en banc); *see also Fed. Sav. And Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987).

As for reply briefs, this Court also declines to consider issues raised for the first time in an appellant's reply brief. *See, e.g., KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1328 n.4 (11th Cir. 2004) (quoting *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987)); *United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996); *Jackson v. United States*, 976 F.2d 679, 680 n.1 (11th Cir. 1992); *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *United States v. Benz*, 740 F.2d 903, 916 (11th Cir. 1984).

[4] In *Nealy*, this Court noted that "[p]arties must submit all issues on appeal in their initial briefs." 232 F.3d at 830 (citing Fed. R. App. P. 28(a)(5)). The *Nealy* Court explained that supplemental briefs will be authorized, pursuant to 11th Cir. R. 28-1, I.O.P.5, only when intervening decisions or new developments arise after the moving party's brief has been filed and only when that new authority relates to an issue or issues already properly raised in the party's initial brief. *Id.* The Court expressly concluded that "parties cannot properly raise new issues at supplemental briefing, even if the [new] issues arise based on the intervening decisions or new developments cited in the supplemental authority." *Id.* The new indictment issue we refused to hear in *Nealy* was *Apprendi*-based. *Id.*

in opening briefs "serves valuable purposes, as do all of the procedural default rules, which is why we regularly apply them. *See generally Presnell v. Kemp*, 835 F.2d 1567, 1573-74 (11th Cir. 1988)." *Ardley*, 273 F.3d at 991 (Carnes, J., concurring in the denial of rehearing *en banc*).[5] Two of those valuable purposes are judicial economy and finality. Indeed, both purposes are implicated in this case as Levy concedes that he did not raise any constitutional challenges to the sentencing guidelines or his sentence or any *Apprendi*-type argument until *after* this Court had already held oral argument and issued a published opinion affirming his sentences.

Accordingly, based on our prudential rule, this Court denied Levy's petition for rehearing, based on his failure to raise any *Apprendi*-type issue in his initial brief on appeal. *Levy*, 379 F.3d at 1245.

III. CONSIDERATION IN LIGHT OF *BOOKER*

Because of the Supreme Court remand, we now further consider Levy's sentences in light of *Booker*. We recognize that in *Booker*, the Supreme Court instructed courts to "apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, 125 S.Ct. at 769. However, the *Booker* Court itself emphasized that even though *Booker* was to be applied to cases on direct review it did not mean "that every sentence gives rise to a Sixth Amendment violation [or] that every appeal

[5] Importantly, this rule applies with equal force, regardless of whether it is the government, criminal defendant, or any other party to litigation who has failed to raise an issue in their opening brief.

will lead to a new sentencing hearing." *Id.* In fact, the Supreme Court in *Booker* also directed courts to "apply ordinary prudential doctrines [including], for example, whether the issue was raised below. . . . " *Id.*

Moreover, this principle recognized in *Booker* – that retroactivity is subject to ordinary prudential doctrines – is also explicitly recognized in two other Supreme Court cases. *See Shea v. Louisiana*, 470 U.S. 51, 58 n.4, 105 S.Ct. 1065, 1069 n.4 (1985); *Pasquantino v. United States*, 125 S.Ct. 1766, 1781 n.14 (2005).

For example, in *Shea v. Louisiana*, the Supreme Court concluded that "if a case was pending on direct review at the time *Edwards* [*v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981)] was decided, the appellate court must give retroactive effect to *Edwards*, subject, of course, to established principles of waiver, harmless error, and the like." *Shea*, 470 U.S. at 58 n.4, 105 S.Ct. at 1069 n.4. According to *Shea*, courts of appeal must subject the retroactive effect of new cases to established prudential rules. *Id.* As noted above, this Court's prudential rule that issues not raised in a party's initial brief will not be considered is certainly well-established. Thus, as dictated in *Shea*, the retroactive effect of *Booker* is subject to our established prudential rules.

Further, in *Pasquantino v. United States*, the Supreme Court applied its own prudential rules to foreclose the ability of defendants to raise untimely *Blakely* claims. In *Pasquantino v. United States*, issued after *Booker*, the petitioners argued "in a footnote that their sentences should be vacated in light of *Blakely*. . . . " *Pasquantino*, 125 S.Ct. at 1781 n.14. However, "Petitioners did not raise this claim before the Court of Appeals or in their petition

for certiorari." *Id.* Although the petitioners failed to previously raise the issue, the dissent emphasized that "[t]his omission was no fault of the defendants, . . . as the petition in this case was filed and granted well before the Court decided *Blakely*. Petitioners thus raised *Blakely* at the earliest possible point: in their merits briefing." *Pasquantino*, 125 S.Ct. at 1783 n.5 (Ginsburg, J., dissenting). Despite the fact that the petitioners raised their *Blakely* claim at the earliest possible moment after that decision was released, the Supreme Court applied its prudential procedural rules and declined to address the issue. *Pasquantino*, 125 S.Ct. at 1781 n.14.

It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim.

We also point out why *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), is fully consistent with our established prudential rule. In *Griffith*, the Supreme Court concluded that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final. . . . " *Id.* at 328, 107 S.Ct. at 716. However, *Griffith* addressed a situation in which the defendant timely raised the error in issue in both *the district court* and *the court of appeals*. As we have stated, "[t]he *Griffith* holding . . . applies only to defendants who preserved their objections throughout the trial and appeals process." *Verbitskaya*, 406 F.3d at 1340

n.18 (citing *Griffith*, 479 U.S. at 316-20, 107 S.Ct. at 709-11).[6]

Thus, there are two distinct and independent rules: (1) retroactivity; and (2) this Court's prudential rule that issues not raised in the opening brief are abandoned. Although each rule plays an equally important role in the orderly administration of justice, they answer different questions. As explained by Judge Carnes in *Ardley*,

> [r]etroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway.

Ardley, 273 F.3d at 992 (Carnes, J., concurring in the denial of rehearing *en banc*).

Requiring all parties to raise issues in their initial briefs is not unduly harsh or overly burdensome. This is particularly true about constitutional challenges to the federal sentencing guidelines, which have continued to be raised for many years despite adverse precedent. Moreover, when *Apprendi* was decided in 2000, criminal

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[6] The *Griffith* Court did not require that a dissimilarly situated defendant – one who did not preserve his objection below or on appeal – would necessarily benefit from the new constitutional rule. Instead, the *Griffith* holding is necessary to "treat[ ] similarly situated defendants the same." *Griffith*, 479 U.S. at 323, 107 S.Ct. at 713. Parties who fail to raise timely claims of error are not similarly situated to those who properly preserved their claims. After all, that is the very basis of plain-error review. Likewise, those parties that timely raise issues in their initial appellate briefs are not similarly situated to those who fail to timely raise issues in their initial appellate brief.

defense attorneys were well aware of *Apprendi*'s potential impact on the sentencing guidelines well before the Supreme Court's decisions in *Blakely* and *Booker*. For example, in numerous cases before our Court, defense counsel, after *Apprendi* and before *Blakely*, asserted that their clients' rights to a jury trial were violated when the district court enhanced their sentences with extra-verdict enhancements not proved to a jury beyond a reasonable doubt. *See, e.g., United States v. Reese*, 382 F.3d 1308, 1309 (11th Cir. 2004), *vacated by* 125 S.Ct. 1089 (2005)[7]; *United States v. Petrie*, 302 F.3d 1280, 1289-90 (11th Cir. 2002), *cert. denied*, 538 U.S. 971, 123 S.Ct. 1775 (2003); *United States v. Snyder*, 291 F.3d 1291, 1294 n.3 (11th Cir. 2002); and *United States v. Rodriguez*, 279 F.3d 947, 949-50, 950 n.2 (11th Cir. 2002). These *Apprendi*-type arguments about federal sentencing enhancements were made in those cases not only before *Blakely* but also despite adverse precedent in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001).

Although it may be true that most attorneys could not have predicted the Supreme Court's precise resolution of the sentencing issues in *Booker*, the general argument that the federal sentencing guidelines are unconstitutional or that a jury, not a judge, must decide the facts supporting extra-verdict sentencing enhancements was available to counsel long before *Blakely* and *Booker*. *See McGinnis*, 918 F.2d at 1496 (stating that although no one could have

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[7] For example, Reese's initial brief was filed on January 20, 2004, before *Blakely* was decided on June 24, 2004. In his initial brief on appeal, Reese made an *Apprendi*-based argument about a sentencing enhancement he received. *Reese*, 382 F.2d 1308, 1310 n.1.

predicted the Supreme Court's resolution of a case resolving the scope of § 1981, the general argument that § 1981 did not apply to appellant's conduct was available, and appellant waived its argument by not raising it in its initial brief).[8]

Moreover, although this Court does not consider *Blakely*, now *Booker*, issues not raised in any way in a party's initial brief, we have liberally construed what it means to raise a *Blakely*-type or *Booker*-type issue. *See United States v. Dowling*, 403 F.3d 1242, 1246 (11th Cir. 2005) (evaluating whether a *Blakely/Booker* claim was made by reviewing whether a defendant: (1) referred to the Sixth Amendment; (2) referred to *Apprendi* or another related case; (3) asserted his right to have the jury decide the disputed fact; *or* (4) raised a challenge to the role of the judge as factfinder with respect to sentencing factors). Levy concedes he made no such claim in any manner until his petition for rehearing. Thus, the application of this Court's prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim does not result in manifest injustice.

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[8] There is a good example of the continued availability of previously foreclosed arguments in the *Apprendi* line of cases. *Compare Walton v. Arizona*, 497 U.S. 639, 649, 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511 (1990), with *Ring v. Arizona*, 536 U.S. 584, 588-89, 595, 122 S.Ct. 2428, 2432, 2436 (2002) (overruling *Walton*). The defendant in *Ring* preserved his argument about Arizona's capital sentencing scheme even though that argument appeared foreclosed by *Walton*.

IV. THE AFFECT OF SUPREME COURT REMANDS ON THE APPLICATION OF THIS COURT'S PRUDENTIAL RULES

Finally, we discuss the specific remand order in Levy's case. Since *Booker*, the Supreme Court has remanded over a hundred of our Circuit's cases with this standard order or something similar: "The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005)." As noted above, this same order was used in Levy's remand. Obviously, some of these remands, including *Levy*, involved cases in which this Court applied its prudential rules and refused to consider defendant's belated efforts to raise *Blakely/Booker* claims. *See, e.g., Levy v. United States*, ___ S.Ct. ___, 2005 WL 540692 (U.S. June 6, 2005) (No. 04-8942); *Sears v. United States*, 125 S.Ct. 1348 (2005); *Dockery v. United States*, 125 S.Ct. 1101 (2005).[9] As noted above, *Booker* itself recognized that retroactivity is subject to ordinary prudential rules, and thus nothing in *Booker* undermines or affects our prudential rules; if anything, *Booker* contemplates that they should be applied in *Booker*-remand cases.

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[9] In other cases where a defendant timely raised a Sixth Amendment or *Apprendi* or *Blakely* issue in the opening brief, as many defendants did prior to *Booker*, this Court has considered the merits of those claims. *See, e.g., United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005); *United States v. Martinez*, 407 F.3d 1170 (11th Cir. 2005); *United States v. Orduno-Mireles*, 405 F.3d 960 (11th Cir. 2005); *United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. 2005), *opinion vacated and superceded by* ___F.3d ___, 2005 WL 1297236 (11th Cir. June 2, 2005); *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).

Further, in a concurring opinion in *Ardley*, Judge Carnes explained another reason why this type of general remand does not necessarily impinge on this Court's application of its prudential rules, as follows:

> Whenever the Supreme Court decides an important issue of law, it routinely takes every case in which the court of appeals decision came out before the new decision was announced and in which the certiorari petitioner claims that new decision might apply, and treats all of those cases the same. The uniform treatment given all such cases is to vacate the court of appeals judgment and remand the case for further consideration in light of the new decision. Those boilerplate orders come out in bushel baskets full. There is no implication in the standard language of those orders that the court of appeals is to do anything except reconsider the case now that there is a new Supreme Court decision that may, or may not, affect the result. We have never felt constrained to read anything into such routine remands other than the direction that we take another look at the case because of the new decision.

Ardley, 273 F.3d at 994 (Carnes, J., concurring in the denial of rehearing *en banc*). As this Court has now consistently concluded, the Supreme Court's general remand in these types of cases does not mandate any particular outcome as to the defendant's sentence, nor do they preclude this Court from applying its prudential rules in a uniform and consistent manner. *See Pipkins*, 2005 WL 1421449, at *2; *Sears*, 2005 WL 1334892, at *1; *Dockery*, 401 F.3d at 1262-63; *Ardley*, 273 F.3d at 995 (Carnes, J., concurring in the denial of rehearing *en banc*).

Instead, what is required is that we take another look at this case and consider it in light of *Booker*. We have done so, and, consistent with *Booker* and our case law, we affirm Levy's sentences for the reasons outlined herein and in our prior opinions. We also reinstate our prior panel opinion affirming Levy's sentences in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and, to the extent necessary, our opinion denying Levy's petition for rehearing by the panel in *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004).

AFFIRMED and PRIOR OPINIONS REINSTATED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11083

D.C. Docket No. 02-14049-CR-DLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN HOWARD VANORDEN, JR.,
a.k.a. "Robotruc@Bellsouth.net",

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 2005)

**ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES**

Before TJOFLAT and MARCUS, Circuit Judges, and MUSGRAVE*, Judge.

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* Honorable Kenton R. Musgrave, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

On November 4, 2002, John Howard Vanorden, Jr. pled guilty to one count of receiving a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). The base offense level for this offense was seventeen. *U.S. Sentencing Guidelines Manual* § 2G2.2(a) (2002). The district court added two levels because the material involved depicted children under the age of twelve, *id.* § 2G2.2(b)(1), five levels because the offense involved "[d]istribution for the receipt, or expectation of receipt, a thing of value, but not for pecuniary gain," *id.* § 2G2.2(b)(2)(B), four levels because the offense involved masochistic conduct, *id.* § 2G2.2(b)(3), and two levels because the offense involved a computer, *id.* § 2G2.2(b)(5). The court subtracted three levels based on Vanorden's acceptance of responsibility. *Id.* § 3E1.1. These adjustments resulted in a total offense level of twenty-seven, which yielded a guideline sentencing range of 70-87 months imprisonment when coupled with Vanorden's criminal history category of I. On appeal, Vanorden raised only one issue: whether the district court had erred in enhancing his sentence under § 2G2.2(b)(2)(B), *supra*, because that guideline did not apply to his conduct. He did not raise a constitutional challenge to his sentence based on the Sixth Amendment right to a trial by jury, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), or *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).[1] We

[1] This omission is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in

(Continued on following page)

rejected Vanorden's lone claim and affirmed his sentence in an unpublished opinion. *United States v. Vanorden*, 99 Fed. Appx. 875 (11th Cir. Apr. 2, 2004).

Vanorden thereafter filed a petition for a writ of certiorari. On January 24, 2005, the Supreme Court granted Vanorden's petition, vacated our decision, and remanded the case "for further consideration in light of [*Booker*]." *Vanorden v. United States*, 543 U.S. ___, 125 S. Ct. 1040, 160 L. Ed. 2d 1026 (2005). Under our recent decision in *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), however, "further consideration in light of *Booker*" does not actually require any consideration of the merits of Vanorden's *Booker* claim:

> Nothing in the [*Booker*] opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us. Nor is there anything in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the [*Booker*] issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Id. at 1262-63 (quoting *United States v. Ardley*, 242 F.3d 989, 990, *reh'g en banc denied*, 273 F.3d 991 (11th Cir.

Apprendi, "ha[d] no application to, or effect on, . . . Sentencing Guidelines calculations, when . . . the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty," *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir. 2001) (en banc).

2001)). Because Vanorden did not challenge his sentence on Sixth Amendment-*Apprendi-Blakely-Booker* grounds in his first trip through this circuit, this argument is "deemed abandoned." Accordingly, we reinstate our previous opinion and AFFIRM Vanorden's sentence.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the judgment of the panel because we are bound by *Dockery*. *See, e.g.*, *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986) ("Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision."). If we were writing on a clean slate, I would consider the merits of Vanorden's *Booker* claim. As the panel notes, *Dockery* concludes that nothing in either *Booker* itself or in the standard Supreme Court order remanding a case "for further consideration in light of [*Booker*]" "requires or suggests that we are obligated to consider" a *Booker* claim that was not raised in the defendant's initial brief on appeal. Under *Dockery*, such a claim is "deemed abandoned" even if the defendant's initial brief was filed before *Blakely* and *Booker* were decided, at which time this and every other circuit had squarely rejected identical arguments. *Dockery*, 401 F.3d at 1262-63 (quoting *Ardley*, 242 F.3d at 990).

This is a strange rule we have: in a case in which the Supreme Court has vacated our decision "for further consideration in light of [*Booker*]" precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we decline to actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme

Court precedent and the law of every other circuit, but also encourages defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable. *See United States v. Levy*, 391 F.3d 1327, 1335-51 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc); *Ardley*, 273 F.3d at 995-1007 (Tjoflat, J., dissenting from the denial of rehearing en banc). Nonetheless, it is a strange, bad rule that is the law of the circuit, so I concur rather than dissent. I write separately to explain briefly (1) why it is particularly troubling that this court continues to refuse to address *Booker* claims in "GVR" cases (*i.e.*, cases in which the Supreme Court has granted the defendant's petition for certiorari, vacated the prior judgment of this court, and remanded for further consideration in light of *Booker*) and (2) the practical consequences of our rule.

To begin with, I cannot agree with *Dockery*'s determination that "[n]othing in the [*Booker*] opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us." *Dockery*, 401 F.3d at 1262 (quoting *Ardley*, 242 F.3d at 990). In *Booker*, the Supreme Court clearly instructed that "we *must* apply [*Booker*'s] holdings – both the Sixth Amendment holding and [its] remedial interpretation of the Sentencing Act – to *all* cases on direct review." *Booker*, 543 U.S. at ___, 125 S. Ct. at 769 (emphasis added). In other words, *Dockery* finds nothing in the Supreme Court's specific directive that we *must* apply *Booker* to *all* cases on direct review that even *suggests* that we should address *Booker* claims in this subset of cases on direct review (*i.e.*, cases in which the defendant's initial brief did not contain a *Booker*-type claim for the imminently sensible reason

that such a claim had been rejected by each and every circuit). Other circuits have, to say the least, read *Booker*'s instruction differently. *E.g.*, *United States v. Ameline*, ___ F.3d ___, 2005 WL 1291977, at *11 (9th Cir. June 1, 2005) (en banc) ("*Booker* explicitly stated that its holding applies to all cases pending on direct appeal. *Booker*, 125 S. Ct. at 769. Even where the briefs filed by the parties do not raise a *Booker* objection, we conclude that the issue may be raised and should be considered."); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" (citation omitted) (quoting *Booker*, 543 U.S. at ___, 125 S. Ct. at 769)).

To be sure, the *Booker* Court did go on to say that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." 543 U.S. at ___, 125 S. Ct. at 769. And the Supreme Court has also said that the general principle that a decision concerning the conduct of criminal prosecutions must be applied to all cases still pending on direct review is "subject, of course, to established principles of waiver, harmless error, and the like." *Shea v. Louisiana*, 470 U.S. 51, 58 n.4, 105 S. Ct. 1065, 1069 n.4, 84 L. Ed. 2d 38 (1985).[1] These qualifications of the general principle do

[1] *Shea* was decided two years before *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), which was the first Supreme Court case to hold that, without exception, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

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not, however, implicate this case. First, the rule followed in *Dockery* is not an "ordinary prudential doctrine"; in fact, it is a quite *extra*ordinary rule in that we invented it only four years ago and it has not been followed by any other circuit. *See Levy*, 391 F.3d at 1343-48 (Tjoflat, J., dissenting from the denial of rehearing en banc). Second, the fact that Vanorden's claim is "subject . . . to established principles of waiver" is inapposite because Vanorden has done nothing that can plausibly be construed as a "waiver." As the Supreme Court has explained, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). Thus, while Vanorden did forfeit his *Booker* claim by failing to "timely assert[]" it – which means that review in his case should be for plain error only – it is clear that he has not "waived" it. At the time the supposed waiver took place – when Vanorden's lawyer filed his initial brief in April 2003 – *Blakely* and *Booker* had not yet been decided,[2] and this circuit and every other had squarely rejected *Blakely/Booker*-type arguments. It, therefore,

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cases, state or federal, pending on direct review or not yet final." *Id.* at 328, 107 U.S. at 716.

[2] Vanorden's opening brief was filed on April 17, 2003, about three weeks before a petition for certiorari was filed in *Blakely*, *see* Petition for a Writ of Certiorari, *Blakely* (No. 02-1632), and about six months before the court granted the petition, *Blakely v. Washington*, 540 U.S. 965, 124 S. Ct. 429, 157 L. Ed. 2d 309 (2003).

makes no sense to say that Vanorden "intentional[ly] relinquish[ed]" a "known" Sixth Amendment right.[3] In

[3] Several other circuits have expressly agreed that such an omission is not a "waiver." *E.g.*, *United States v. Vazquez-Rivera*, 407 F.3d 476, 487-88 (1st Cir. 2005); *United States v. Macedo*, 406 F.3d 778, 789 (7th Cir. 2005); *United States v. McDaniel*, 398 F.3d 540, 546-47 (6th Cir. 2005).

In my dissent in *Levy*, I tried to explain the difference between "waiver" and "forfeiture" and its significance in this context: a new constitutional rule concerning criminal prosecutions applies to *all* cases then pending on direct review unless the defendant has waived (and not just forfeited) the claim, *see supra* note 1 and accompanying text; and, moreover, Federal Rule of Criminal Procedure 52(b) extends plain-error review to all issues unless they have been waived (and not just forfeited) by the defendant, *see Olano*, 507 U.S. at 732-34, 113 S. Ct. at 1777. The waiver/forfeiture distinction is thus crucial. *See generally Levy*, 391 F.3d at 1339 n. 7, 1341-43 (Tjoflat, J., dissenting from the denial of rehearing en banc). My discussion of this point drew the following response from the concurrence:

> The dissent . . . attempts to make a distinction between waiver, forfeiture, and abandonment. However, the dissent misunderstands the issue. The issue is not whether Levy's failure to raise his *Blakely*-type issue necessarily constitutes waiver, forfeiture, or abandonment. Rather, the issue is whether this Court will apply its well-established procedural rules; that is, this Court will not consider claims raised in a petition for rehearing that were never raised, in any form, in a defendant's initial brief on direct appeal.
>
> The dissent attempts to confuse the issue by discussing the difference between waiver, forfeiture, and abandonment. The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does. Rather, this Court, out of concerns for judicial economy and finality, has elected to adopt and apply procedural rules universally and equally. This is not only fair and consistent, but a logical extension of the Supreme Court's decision in *Shea*.

Id. at 1334-35 (Hull, J., concurring in the denial of rehearing en banc).

My discussion was not intended to "confuse" anyone. I understand, of course, that the issues-not-briefed-are-waived rule does not turn on

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sum, because the rule that bars Vanorden's *Booker* claim is not an "ordinary prudential doctrine," and because Vanorden has done nothing to "waive" his claim, *Booker* does, in fact, obligate us to consider it. *Dockery*'s conclusion to the contrary is erroneous and should be corrected by this court sitting en banc or by the Supreme Court.

I also cannot agree with the conclusion reached in *Dockery* that nothing in the Supreme Court's standard GVR order requires us to consider claims such as Vanorden's. The precise significance of these orders has always been something of a mystery,[4] but the Supreme Court's

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the waiver/forfeiture distinction; rather, its application turns simply on whether the issue was in the brief. The point I was endeavoring to make is that because *Griffith*, *Shea*, and *Olano* do turn on this distinction, we cannot go merrily along "adopt[ing] and apply[ing] procedural rules" in a way that conflicts with those decisions. In the end, the essence of the concurrence's position was that our rule (a) does not require a knowing and intelligent waiver and (b) is "but a logical extension of the Supreme Court's decision in *Shea*." To its credit, the concurrence did concede that its position was an "extension" of Supreme Court precedent. But the problem remains that this extension is neither "logical" nor justifiable because "[w]aiver is different from forfeiture," *Olano*, 507 U.S. at 733, 113 S. Ct. at 1773; contrary to the concurrence's position, the terms are not freely interchangeable.

[4] *See generally* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1983); *see also Henry v. City of Rock Hill*, 376 U.S. 776, 776-77, 84 S. Ct. 1042, 1043, 12 L. Ed. 2d 79 (1964) (stating that a GVR is appropriate when the Court is "not certain that the case was free from all obstacles to reversal on an intervening precedent" but the intervening decision is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case"); Robert L. Stern et al., *Supreme Court Practice* 319 (8th ed. 2002) (stating that when the Supreme Court issues a GVR, "the lower court is being told simply to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result").

discussion of its GVR power in *Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996), nonetheless implies that we should not disregard claims like the one presented here. In *Stutson*, after the defendant was convicted of cocaine possession and sentenced to 292 months in prison, his attorney filed his notice of appeal in the district court, rather than in the court of appeals (as required by Federal Rule of Appellate Procedure 4(b)), and one day late. The district court held that this mistake barred any appeal because it did not constitute "excusable neglect" under Rule 4(b). Shortly before the district court's decision, the Supreme Court had held that comparable attorney negligence could establish "excusable neglect" under the bankruptcy rules; however, that opinion was not cited in the briefs to the district court or in the district court's decision. On appeal in this court, the parties disputed the applicability of the bankruptcy decision in the criminal context. We affirmed without oral argument or written opinion. By the time the case reached the Supreme Court, however, all six circuits to address the issue had held that the "excusable neglect" standard articulated in the bankruptcy case also applied in the criminal context, and the Government had even changed its position to agree with those circuits. *See id.* at 194-95, 116 S. Ct. at 601-02. The Court concluded that "this exceptional combination of circumstances present[ed] ample justification for a GVR order" – even though the GVR was "for further consideration in light of" an opinion that was addressed in the briefs filed below, and even though the Government had not confessed error, but merely disavowed its previous litigating position. *Id.* at 195-96, 116 S. Ct. at 602.

Stutson's holding concerning the scope of the Supreme Court's GVR power is, of course, not relevant here. But some of its discussion of the purpose of those orders is instructive. The Court first emphasized,

> [I]t is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that caused no prejudice to the prosecution to preclude a remand . . . "in the interests of justice." And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. . . .
>
> Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience." "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts."

Id. at 196-97, 116 S. Ct. at 603 (citations omitted) (quoting *Wood v. Georgia*, 450 U.S. 261, 265, n.5, 101 S. Ct. 1097, 1100, n.5, 67 L. Ed. 2d 220 (1981), and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274, 63 S. Ct. 236, 239, 87 L. Ed. 268 (1942)). These concerns apply with equal force here. In view of the fact that Vanorden is "subject to the continuing coercive power of the Government in the form of imprisonment," it is not too much to ask that we make the minor "procedural accommodations" necessary to determine whether any portion of his sentence of imprisonment violates the Constitution. The Supreme Court has consistently identified the end of a

defendant's direct appeal as the point at which systemic interests in finality surpass the defendant's interest in benefitting from a new rule of constitutional law.[5] By refusing to consider claims such as Vanorden's, we have said essentially that the Supreme Court struck the wrong balance and that the defendant's opening brief on appeal should be the tipping point. Because our reevaluation is based on nothing more than "convenience" and "dry formalism," it is inconsistent with the important and "familiar aspect[s]" of "our legal traditions" *Stutson* emphasizes.

The *Stutson* Court also explained some of the reasons for the GVR order it issued: "a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations" and also "promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson*, 516 U.S. at 197, 116 S. Ct. at 603. Three aspects of this description of the GVR order are instructive here: First, to "guarantee [] . . . full and fair consideration" of all of a person's "rights" implies more than to permit review of those issues that were previously raised in the court of appeals. Second, a GVR order does not "promote[] fairness" if the court of appeals refuses to give the case

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[5] *E.g.*, *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); *Griffith*, 479 U.S. at 328, 107 S. Ct. at 716 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

"further consideration in light of" the very decision that triggered the GVR, as the defendant is then no better off than he was before the GVR. Third, if one purpose of a GVR order is for the court of appeals "to consider . . . arguments that were not previously before it," then we thwart that purpose by failing to consider *Booker* issues in cases like this one. Thus, although *Stutson* is not clearly controlling, its rationale does suggest that GVR orders are more significant than this court has been willing to admit.

Lastly, it must be clear that our *Ardley-Levy*[6]*-Dockery* line of cases is especially pernicious because it constitutes an absolute, across-the-board bar to claims such as the one we refuse to consider here. These claims are now barred on both direct appeal and collateral review, and they also cannot form the basis of an ineffective assistance of counsel claim, *see Levy*, 391 F.3d at 1334 n.3 (Hull, J., concurring in the denial of rehearing en banc); *Ardley*, 273 F.3d at 993-94 (Carnes, J., concurring in the denial of rehearing en banc).[7] The upshot of our rule, therefore, is

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[6] The Supreme Court has vacated the judgment in *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), and remanded for further consideration in light of *Booker*. *United States v. Levy*, 543 U.S. ___, ___ S. Ct. ___, 2005 WL 540692 (June 6, 2005) (No. 04-8942).

[7] If on direct review, an appellate court improperly refuses to apply *Booker* retroactively, "then a court conducting collateral review of such a conviction should rectify the error and apply [*Booker*] retroactively." *Shea*, 470 U.S. at 58 n.4, 105 S. Ct. at 1069 n.4. Thus, on collateral review, a defendant such as Vanorden will have a substantial argument that *Booker* should apply retroactively. I have no doubt that most such defendants will make this argument, that the district courts in this circuit will have to adjudicate their claims, and that we will at least have to deal with them in the form of applications for certificates of appealability. The same is true with respect to ineffective assistance claims based on counsel's failure to raise a *Booker*-type claim in the defendant's opening brief. Although these claims are unlikely to

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that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review, *e.g.*, *Booker*, 543 U.S. at ___, 125 S. Ct. at 769; *Griffith*, 479 U.S. at 328, 107 S. Ct. at 716, will not apply at all to cases on direct review like this one.[8]

I continue to disagree with the rule we apply in this case for all the reasons given in my dissents in *Levy* and *Ardley*. As explained here, this rule is particularly problematic when applied to cases on remand from the Supreme Court. Hopefully, this court sitting en banc, or the Supreme Court, will soon correct this practice. However,

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succeed, they will surely be litigated, particularly given that we have characterized counsel's omission as a "waiver" of the possibility of a substantially lower sentence. Thus, I am not saying that these claims will not be raised on collateral review; rather, I am simply observing here that it is all but certain that they will fail because (1) the district court and this court on appeal will be bound to conclude that the refusal to apply *Booker* on direct appeal was entirely proper, and (2) six of the twelve judges on this court joined an opinion concurring in the denial of rehearing en banc in either *Ardley* or *Levy* that stated that this sort of "waiver" will not constitute ineffective assistance of counsel.

[8] In contrast, in *Stutson*, *supra*, it was at least clear that the defendant was left with an ineffective assistance claim even if the Supreme Court did not GVR his direct appeal. *See generally Roe v. Flores-Ortega*, 528 U.S. 470, 480, 484, 120 S. Ct. 1029, 1036, 1038, 145 L. Ed. 2d 985 (2000) (holding that counsel's failure to file a timely notice of appeal without first consulting the defendant constitutes ineffective assistance if (1) "there is reason to think . . . that a rational defendant would want to appeal" or the defendant himself "reasonably demonstrated to counsel that he was interested in appealing" and (2) there is a reasonable probability that the defendant would have appealed but for counsel's failure to consult him). Nonetheless, the Supreme Court emphasized that "convenience" and "formalism" should not stand in the way of considering his claim on direct appeal.

because a panel of this court is not free to do so, I concur in the judgment.

No. 04-1210

Supreme Court, U.S.
FILED
JUN 17 2005
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In The Supreme Court of the United States

GREGORY WADE HEMBREE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner respectfully moves for rehearing for the limited purpose of clarifying this Court's order that summarily granted the petition for a writ of certiorari, vacated the court of appeals' decision, and remanded to the court of appeals "for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005)."

The question presented in the petition involved whether the Eleventh Circuit erred by refusing to apply *Booker* in this case because the Petitioner had not raised a challenge consistent with *Booker* in his initial brief.[1] At the time the Petitioner filed the initial brief, that challenge was foreclosed by binding circuit precedent. (Petition at i.) Both the Petitioner and the United States focused solely on the issue of whether the court of appeals should have applied *Booker* to the Petitioner even though he did not raise it in his initial brief. In light of this Court's decision to grant the petition and vacate the judgment, it appears clear to the Petitioner that the Court agrees with Petitioner that the court of appeals was required to apply *Booker* to determine whether the Petition could demonstrate plain error in his sentence.

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[1] The precise question presented was framed as follows:

> When this Court issues an opinion establishing a new rule for the conduct of criminal prosecutions to be applied retroactively to all cases pending on direct appeal, as it did in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), may a court of appeals nonetheless refuse to apply the rule to a defendant who had already filed his or her initial brief before the rule was announced and, therefore, did not raise the issue in the initial brief.

(Petition at i.)

The Petitioner, nonetheless, is concerned that the Eleventh Circuit will not share this interpretation of the Court's order. On at least twelve occasions, this Court has issued identical orders to the Eleventh Circuit, and on each occasion the court of appeals interpreted the remand instruction to allow it to refuse to consider the *Booker* challenge on the ground that it was not included in the initial brief. For example, in *Dockery v. United States*, 543 U.S. ___, 125 S. Ct. 1101 (U.S. 2005) (No. 04-7816), this Court issued an identical grant, vacate, and remand order. On remand, the Eleventh Circuit held that, in the absence of a statement by this Court directing it to consider the merits of the *Booker* challenge, it was free to refuse to consider the argument on the ground that it was not raised in the initial brief. *United States v. Dockery*, 401 F.3d 1261, 1263 (11th Cir. 2005). In reaching this opinion, the court of appeals quoted with approval its reasoning in an earlier opinion involving the same issue under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (the progenitor of *Booker*):

> Nothing in the *Apprendi* opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us. Nor is there anything in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the *Apprendi* issue had been timely raised in this Court. **In the absence of any requirement to the contrary in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.**

Dockery, 401 F.3d at 1262-63 (emphasis added) (quoting *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir.), *cert. denied*, 533 U.S. 962 (2001)).

Following *Dockery*, the Eleventh Circuit has similarly refused to apply *Booker* in at least eleven other cases in which this Court granted, vacated, and remanded for reconsideration in light of *Booker*.[2] In at least two of those cases, the petitioner/defendant had, like the Petitioner in this case, sought leave to add a *Booker* argument and been denied by the court of appeals before the original decision. *United States v. Mosley*, Case No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005);

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[2] *United States v. Smith*, Case No. 04-10567, 2005 WL 1369987 (11th Cir. June 9, 2005); *United States v. Sears*, ___ F.3d ___, 2005 WL 1334892 (11th Cir. June 8, 2005); *United States v. Banks*, Case No. 04-11715, 2005 WL 1350658 (11th Cir. June 8, 2005); *United States v. Mitchell*, Case No. 03-15798, 2005 WL 1333076 (11th Cir. June 7, 2005); *United States v. Mosley*, Case No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005); *United States v. Lytle*, Case No. 03-15444, 2005 WL 1140772 (11th Cir. May 16, 2005); *United States v. Marshek*, Case No. 03-14338, 2005 WL 1122647 (11th Cir. May 12, 2005); *United States v. Padilla*, Case No. 04-11086, 2005 WL 1114353 (11th Cir. May 11, 2005); *United States v. Baldwin*, 128 Fed. Appx. 759, 2005 WL 1114360 (11th Cir. May 11, 2005); *United States v. Charles-Sanchez*, 128 Fed. Appx. 760, 2005 WL 1114365 (11th Cir. May 11, 2005); *United States v. Lopera*, 128 Fed. Appx. 761, 2005 WL 1114370 (11th Cir. May 11, 2005); *United States v. Triplett*, 128 Fed. Appx. 105, 2005 WL 1106564 (11th Cir. May 10, 2005); *United States v. Bennett*, Case No. 03-11060, 2005 WL 1052236 (11th Cir. May 5, 2005); *United States v. Davis*, Case No. 03-15336, 2005 WL 1006053 (11th Cir. May 2, 2005); *United States v. McCrimon*, Case No. 04-12140, 2005 WL 1006055 (11th Cir. May 2, 2005); *United States v. Senn*, 128 Fed. Appx. 96, 2005 WL 1006885 (11th Cir. Apr. 29, 2005); *United States v. McArthur*, Case No. 04-10711, 2005 WL 1395964 (11th Cir. Apr. 27, 2005); *United States v. Garcia-Rodriguez*, 129 Fed. Appx. 521, 2005 WL 901916 (11th Cir. Apr. 19, 2005).

United States v. Baldwin, 128 Fed. Appx. 759, 2005 WL, 1114360 (11th Cir. May 11, 2005).

Based on these decisions, the Petitioner has a substantial fear that the court of appeals will simply rubber stamp a re-instatement of its earlier opinion without applying *Booker* to the facts of this case. Indeed, the United States appears to share this opinion as it opined in its brief in opposition to the certiorari petition that in light of *Dockery*, "it is unnecessary for this Court to remand this case for reconsideration in light of *Booker*." (Br. in Opp. at 4-5 n.1.)

If this happens, the Petitioner will be forced to file another petition for certiorari and the case will be right back in this Court with no progress having been made. As argued in the petition, the district court clearly indicated in the record below that it would have imposed a lower sentence to the Petitioner if it were not bound by the sentencing guidelines. (Petition at 3-4, 24.) The United States did not challenge this assertion in its brief in opposition. Thus, it is very likely that every day of delay in this case is a day that the Petitioner has to spend in federal prison when he would have been free had the Eleventh Circuit applied *Booker* to his case.

Therefore, unless the Court firmly believes that its remand order is sufficiently clear that the court of appeals must apply *Booker*, it should clarify its remand order to

instruct the court of appeals to apply *Booker* as if it had been properly raised in the court of appeals.

Respectfully submitted,

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June 17, 2005

CERTIFICATION OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

_____

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